84-47

No. 83-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

GREGORY ALLEN PERSINGER,
LAWRENCE PERSINGER AND JACQUELINE PERSINGER,
Petitioners,

v.

THE ISLAMIC REPUBLIC OF IRAN AND
THE UNITED STATES OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Foreign Sovereign Immunities Act permits suits against a foreign state for injuries occurring on the premises of a United States embassy caused by the foreign state's tortious conduct.[1]

2. Whether the Foreign Sovereign Immunities Act, which permits suits against a foreign state for injuries "occurring in the United States," prohibits such suits if the tortious conduct causing the injuries did not also occur in the United States.[2]

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[1] Another petition for certiorari presenting a similar question was filed on May 18, 1984, in *McKeel* v. *Islamic Republic of Iran*, No. 83-1890. That petition seeks review of a judgment of the United States Court of Appeals for the Ninth Circuit in a parallel case.

[2] The Ninth Circuit declined to reach this issue in *McKeel*, 722 F.2d 582, 590 n.10 (9th Cir. 1983).

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners ("the Persingers") request certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case. The caption of the case in this Court contains the names of all parties.

OPINIONS BELOW

The opinion of the Court of Appeals on rehearing is reported at 729 F.2d 835 and appears as Appendix A. The court's original decision, vacated on rehearing, was published at 690 F.2d 1010 but was withdrawn by the court. It appears as Appendix B. The district court's opinion and order, which are unreported, appear as Appendix C.

JURISDICTION

The decision of the Court of Appeals, entered on the same day as its judgment, was filed on March 13, 1984. (Pet. App. 1a.) On May 23, 1984, the Chief Justice extended the time for filing this petition from June 11, 1984, to July 11, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1982).

STATUTES INVOLVED

FOREIGN SOVEREIGN IMMUNITIES ACT,

28 U.S.C. § 1603(c) (1982):

"For purposes of this chapter[1]—

* * *

The 'United States' includes all territory and waters, continental or insular, subject to the jurisdiction of the United States."

FOREIGN SOVEREIGN IMMUNITIES ACT,

28 U.S.C. § 1605(a)(5) (1982):

"A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment . . . ."

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[1] Jurisdictional Immunities of Foreign States, Chapter 97 of Title 28 of the United States Code.

STATEMENT OF FACTS

1. Gregory Allen Persinger, a United States Marine Sergeant, was one of the Americans taken hostage when the United States Embassy in Tehran, Iran, was seized on November 4, 1979. Following protracted negotiations, Sergeant Persinger and the other American hostages were released on January 20, 1981, pursuant to an Executive Agreement with Iran.[2] The Executive Agreement purported to extinguish all claims against Iran relating to the seizure of the Embassy and the detention of the hostages.

Sergeant Persinger and his parents, Lawrence and Jacqueline Persinger, filed suit against Iran in the United States District Court for the District of Columbia on February 2, 1981. They alleged that Iran had caused Sergeant Persinger numerous injuries in connection with the events of November 4, 1979. The Persingers further alleged that, as a result of the son's ordeal, the parents had suffered and would continue to suffer severe mental and emotional distress.

The Persingers alleged that the United States Embassy in Tehran is subject to the jurisdiction of the United States within the meaning of the Foreign Sovereign Immunities Act ("FSIA"), which provides that a foreign state "shall not be immune from the jurisdiction of courts of the United States or of the States" in any case in which money damages are sought for—

> "personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment." 28 U.S.C. § 1605(a)(5).

The FSIA defines the "United States" as "all territory and waters, continental or insular, subject to the jurisdiction of the United States." *Id.* § 1603(c).

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[2] The Executive Agreement was embodied in two Declarations of the Government of the Democratic and Popular Republic of Algeria, *reprinted in* 20 I.L.M. 224, 230 (1981).

Counsel for Iran entered an appearance but did not defend. The United States intervened as a defendant and moved to dismiss the complaint, invoking the provision of the Executive Agreement that purports to extinguish all claims against Iran relating to the seizure of the Embassy and the detention of the hostages.

District Judge Oberdorfer granted the government's motion to dismiss on August 21, 1981, ruling that the Executive Agreement was a valid bar to the Persingers' suit. (Pet. App. 55a.) He ruled alternatively that, even apart from the Executive Agreement, the FSIA immunized Iran from suit in federal court for injuries occurring at the United States Embassy in Tehran, because the Embassy premises are not subject to the jurisdiction of the United States within the meaning of the FSIA. (*Id.* at 55a-56a.)

2. On October 8, 1982, the Court of Appeals affirmed the District Court's order of dismissal, agreeing that the Executive Agreement had lawfully extinguished the Persingers' claims. (Pet. App. 48a.) But the Court of Appeals rejected the District Court's conclusion that Iran was in any event immune from suit under the FSIA.[3] In an opinion for a unanimous panel, Judge Bork wrote that, because the United States exercises jurisdiction over its embassies, they constitute "territory . . . subject to the jurisdiction of the United States" under Section 1603(c); thus the injuries inflicted by Iran on the American hostages occurred "in the United States" under Section 1605(a)(5). (Pet. App. 34a.) For that reason, "Iran cannot claim sovereign immunity in this case." (*Id.* at 37a.)

The court held that, on its face, "[t]he definition is broad enough to embrace territory under the concurrent jurisdiction of the United States." (*Id.* at 34a.) The court noted that both United States citizens and foreign nationals are subject to the criminal jurisdiction of the United States for acts committed at

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[3] Because the FSIA issue is jurisdictional, the court deemed it necessary to address that issue as a threshold matter. (Pet. App. 28a n.7 & 33a.)

American embassies in violation of United States criminal laws. (*Id.* at 35a.)[4] Recognizing, in addition, that international law substantially removes embassies from the jurisdiction of the receiving state, the court concluded that, "[i]n terms of legal regulation and protection, . . . the situation of American embassy personnel created by the jurisdiction of the United States is more like that of Americans at home than that of Americans outside an embassy living in a foreign country." (*Id.* at 35a-36a.) Thus, Section 1605(a)(5) "by its terms" covers the tortious conduct alleged by the Persingers. (*Id.* at 36a.)

3. Contesting the court's ruling on the sovereign-immunity issue, the government petitioned for rehearing. In a decision on rehearing filed on March 13, 1984, the Court of Appeals vacated its prior opinion. The court again affirmed the District Court's order dismissing the Persingers' suit; this time, however, the court (in a second opinion by Judge Bork) sustained the dismissal order on the ground that, contrary to the court's initial decision, the United States Embassy in Tehran did not constitute "territory . . . subject to the jurisdiction of the United States" under Section 1603(c). The injuries suffered by Sergeant Persinger thus did not occur "in the United States" under Section 1605(a)(5), and Iran therefore was immune from suit under the FSIA. (Pet. App. 8a-13a.)[5]

The court now discerned in the language and the legislative history of the FSIA—and in its own view of proper policy—a bar to tort suits against foreign states for injuries occurring on United States embassy premises; the court concluded that its original construction of Section 1603(c) was "too awkward to be countenanced." (Pet. App. 8a.) The court also deduced from the legislative history that "Congress' principal concern was with torts committed in this country" (*id.* at 8a),[6] and accepted the government's argument that limiting

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[4] Citing *United States* v. *Erdos*, 474 F.2d 157 (4th Cir.), *cert. denied*, 414 U.S. 876 (1973); *United States* v. *Pizzarusso*, 388 F.2d 8 (2d Cir.), *cert. denied*, 392 U.S. 936 (1968).

[5] Circuit Judge Edwards concurred only in the result on this issue. (Pet. App. 17a.)

[6] The court dismissed *Pizzarusso* and *Erdos*, on which it had relied on its earlier opinion, as "inapposite." (Pet. App. 13a.)

Section 1603(c) to United States territory, strictly defined, was required to make the approach of the United States consistent with that of other nations. (*Id.* at 10a.) Finally, the court pointed to a parade of inappropriate results that it asserted would follow from its original interpretation of Section 1603(c). (*Id.* at 10a-12a.)

Against the dissent of Circuit Judge Edwards, the panel also held that Sergeant Persinger's parents could not sue Iran for injuries they suffered in the United States as a result of their son's ordeal. Although Section 1605(a)(5) provides that a foreign state "shall not be immune" in cases where damages are sought for injuries "occurring in the United States," the majority held that immunity nevertheless is preserved unless "both the tort and the injury . . . occur in the United States." (Pet. App. 14a.)

The court's construction was squarely at odds with the interpretation urged not only by the Persingers but also by the United States, which had agreed with the Persingers that, under Section 1605(a)(5), "it is enough if the tortious *injury* occurs in the United States."[7] The United States took the position that Lawrence and Jacqueline Persinger had not suffered sufficiently direct injury as a result of their son's ordeal to give rise to a cause of action against Iran; it noted that Section 1605(a)(5) —in permitting suits against a foreign state for injuries occurring in the United States regardless of where the tortious conduct occurred--marked a "very explicit difference between the FSIA and the [immunity] statutes of other nations."[8] Nevertheless, relying on House Report language that the United States had discounted,[9] and considering other immunity exceptions in Section 1605, the majority held that, for the sake of "policy coherence," the FSIA had to be construed to bar the claims of Sergeant Perginger's parents. (*Id.* at 13a-15a.)[10]

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[7] Reply Brief for the United States on Petition for Rehearing at 5 n.6 (emphasis in original).

[8] *Id.*

[9] *Id.*

[10] Since no party had made such an argument, and the government had explicitly conceded the contrary, the Persingers had had no opportunity to respond.

Judge Edwards, declaring that 'the clear terms of the statute allow for the parents' claims," dissented from the majority's decision "to decide otherwise on 'policy grounds.' " (*Id.* at 18a.)

The Court of Appeals accordingly vacated its decision of October 8, 1982, and, without deciding whether the Executive Agreement was a valid bar to the Persingers' suit,[11] upheld the District Court's order dismissing the suit on sovereign-immunity grounds.

REASONS FOR GRANTING THE WRIT

The decision below has far-reaching consequences. Most immediately, the court's conclusion that the American hostages and their families have no FSIA remedy against Iran is a major setback to their efforts to secure compensation for the suffering they have endured. Even if the Executive Agreement is held a valid bar to their claims against Iran, whether such claims would otherwise have been cognizable in American courts is highly relevant to a determination of what property the United States "took" from them in agreeing to extinguish their claims. What the United States "took" from them is, in turn, critical to the amount of compensation they may recover from the United States in the Claims Court if the Executive Agreement is upheld.[12] Thus, the proper construction of the FSIA is of immediate practical importance.[13]

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[11] The Persingers' challenge to the validity of the Executive Order purporting to extinguish their claims against Iran is accordingly not before this Court.

[12] In *Dames & Moore* v. *Regan*, 453 U.S. 654 (1981), this Court held that the Executive Agreement had validly "suspended" commercial claims against Iran, reserving the question whether, in suspending the claims, the Executive Agreement had effected a taking. *Id.* at 688-89 & n.14. Unlike the suspended commercial claims, which the Executive Agreement provided might be presented to an international claims tribunal, the claims of the hostages and their families were simply wiped out by the Executive Agreement, with no alternative forum provided.

[13] Two cases brought by groups of former hostages and their families, asserting entitlement to compensation for the taking of their claims against Iran by the Executive Agreement, are pending in the Claims Court. *Cooke* v. *United States*, No. 581-82C; *Amburn-Lijek* v. *United States*, No. 564-82C. Proceedings in these cases have been stayed to await the outcome of the instant litigation.

More broadly, the court below has construed the FSIA in a manner that abdicates the authority of the United States to provide remedies in its courts for those injured by the torts of a foreign state while under United States jurisdiction. In enacting the FSIA, Congress meant to extend the protection of our laws to those injured by a foreign state's torts on territory subject to our jurisdiction, and to permit foreign states to be held accountable to the victims of such torts. Congress intended that those who enter upon territory subject to the jurisdiction of the United States should enjoy the protections and suffer the sanctions of our laws. In holding that United States embassy premises are not "subject to the jurisdiction of the United States" within the meaning of the FSIA, the Court of Appeals has subverted these aims of Congress. The frequency in our time of acts of international terrorism directed at our diplomatic personnel on embassy premises abroad makes this a matter of especially serious concern.

Finally, in holding that a foreign state's torts are not actionable unless they occur in the United States, the Court of Appeals has also left all those who suffer injuries in the United States caused by a foreign state's torts abroad without redress in our courts—a result that denies relief not only to victims of intangible injuries, like Lawrence and Jacqueline Persinger, but to victims of physical injuries as well. Contrary to the construction of Section 1605(a)(5) urged both by the Persingers and by the United States, the Court of Appeals majority—on a misunderstanding of the legislative history and to satisfy its own conception of "policy coherence"—imported into Section 1605(a)(5) a limitation that Congress considered but chose not to to impose. This was a gross abuse of federal judicial power, with consequences far beyond the hostage question or the legal regime applicable to embassies.

Both holdings of the Court of Appeals do violence to the plain meaning of the FSIA and the purposes and objectives of Congress in enacting it. The petition should accordingly be granted and the judgment below reversed.

I.

The Court Should Review the D.C. Circuit's Determination That the FSIA Does Not Permit Suits Against a Foreign State for Injuries Occurring on U.S. Embassy Premises Caused by the Foreign State's Tortious Conduct.

Whether Congress in enacting the FSIA intended to permit suits against a foreign state for torts occurring on United States embassy premises depends, as the Court of Appeals recognized, on "whether United States embassies are within the definition of 'United States' set forth in section 1603(c)." (Pet. App. 7a.) In answering that question in the negative, the Court of Appeals erred in three respects.

First, the court erred in reading the language of Section 1603(c) to limit the definition of the "United States" to "the continental United States and such islands as are part of the United States or are its possessions." (Pet. App. 8a.) The court, in its initial decision, concluded after a careful analysis of the statutory language that Section 1603(c)'s definition is "broad enough" to encompass United States embassy premises. (*Id.* at 34a.) On rehearing, however, the Court reasoned that, since all territory is either "continental or insular," the phrase "continental or insular" in Section 1603(c) would be "surplusage" if the definition were construed to mean what it says—that the "United States" includes *all* territory "subject to the jurisdiction of the United States." (*Id.* at 8a.)

This reasoning disregards other statutes that make it unmistakably clear that "continental or insular" does not mean what the Court of Appeals supposed. Thus, the criminal code defines the "United States" as "all places and waters, continental or insular, subject to the jurisdiction of the United States, *except the Canal Zone.*" 18 U.S.C. § 5 (1982) (emphasis added). If the phrase "continental and insular" were meant, as the court below held, to limit the definition of the United States "to the continental United States and such islands as are part of the United States or are its possessions" (Pet. App. 8a), the

express exclusion of the Canal Zone would not have been necessary. The phrase "continental or insular" simply confirms that "all territory" in fact means *all* territory.[14]

As the court noted in its initial opinion, nothing in the language of Section 1603(c) requires that "territory . . . subject to the jurisdiction of the United States" be territory of the United States in any "absolute" sense, or requires that such territory be exclusively subject to United States jurisdiction. (Pet. App. 34a.) In construing the statute on rehearing to impose such requirements, the court therefore not only disregarded the settled precept that sovereign immunity "should be accorded only in clear cases," [15] but did violence to Section 1603(c)'s plain language, impermissibly importing a restriction that Congress did not intend.

Second, the court erred in concluding on rehearing that the legislative history of the FSIA supported its reading of Section 1603(c). On rehearing, the court averred that "Congress' principal concern was with torts committed in this country." (Pet. App. 8a.) In support of this view, the court quoted a passage from H.R. Rep. No. 1487, 94th Cong., 2d Sess. 20-21 (1976), stating:

> "Section 1605(a)(5) is *directed primarily at the problem of traffic accidents* but is cast in general terms as applying to all tort actions for money damages . . . ." (Emphasis supplied by the court.)

But this passage explicitly states that Section 1605(a)(5) is *not* limited to traffic accidents, but extends to "all tort actions for money damages." In its initial opinion, the court relied on the very same passage to conclude that Section 1605(a)(5) *does*

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[14] The section-by-section analysis of the FSIA explains that Section 1603(c) "defines 'United States' as including all territory and waters subject to the jurisdiction of the United States." H.R. Rep. No. 1487, 94th Cong., 2d Sess. 16 (1976). There is no reference to "continental or insular," and no suggestion that Section 1603(c) is to be restrictively construed.

[15] *See, e.g., Victory Transport* v. *Comisaria General,* 336 F.2d 354,360 (2d Cir. 1964), *cert. denied,* 381 U.S. 934 (1965); *Arango* v. *Guzman Travel Advisors Corp.,* 621 F.2d 1371, 1378 (5th Cir. 1980).

permit tort suits for injuries occurring on United States embassy premises. (Pet. App. 34a n.10.) In any event, the passage has nothing to do with whether embassy premises were intended to be included in the section's geographical reach.[16]

The court on rehearing also drew support for its reading of Section 1605(a)(5) from "codifications by other nation-states and international organizations," relying on citations in the government's brief on rehearing. (Pet. App. 10a.) But the authorities cited by the government were statutes and agreements providing that a foreign state cannot claim immunity for torts occurring in the forum state. These materials do not address the question whether embassies should be deemed to be within the forum state for this purpose. The government has not cited any authority (and petitioners know of none) from any country dealing with that question. Moreover, the exceptions to sovereign immunity differ considerably from nation to nation, and the international law on that subject (if indeed international law requires *any* degree of sovereign immunity, which is by no means clear[17]) is, as the House of Lords recently observed, in "a state of uncertainty."[18]

Finally, the legislative history of the FSIA discloses that its authors were well aware that the Act did not track the practice

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[16] The court also supported its view of Section 1605(a)(5) with isolated fragments of testimony by government officials and others that Section 1605(a)(5) would cover torts "in the United States" or "in this country." (Pet. App. 8a-10a.) None of this testimony was focused on the geographical limits of Section 1605(a)(5)'s reach, and such casual phrases cannot override the careful definitional language of Section 1603(c).

[17] For the view that sovereign immunity is a matter of comity rather than a requirement of international law, *see New England Merchants Nat'l Bank* v. *Iran Power Generation & Transmission Co.*, 502 F. Supp. 120, 129 (S.D.N.Y. 1980); Lauterpacht, "The Problem of Jurisdictional Immunities of Foreign States," 28 Brit. Y.B. Int'l L. 220, 228 (1951).

[18] *Playa Larga* v. *I Congreso del Partido*, [1981] 3 W.L.R. 328, 334.

of other nations in all particulars,[19] and the United States in its briefs below conceded as much. [20]

Nothing in international legal precedent prohibits suits of the kind brought here. To the contrary, international law supports the court's initial conclusion that the injuries in question here are actionable in our courts. First, as the court noted in its initial opinion, international law substantially removes foreign embassies from the jurisdiction of the receiving state and makes them subject to the broad exercise of jurisdiction by the sending state. (Pet. App. 35a.)[21] As the court in its initial decision noted, the United States has jurisdiction over

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[19] *See Hearings on Jurisdiction of U.S. Courts in Suits Against Foreign States Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, Serial No. 14, 94th Cong., 2d Sess. 37 (1976) (testimony of Monroe Leigh, Legal Adviser) (legislation has "many points in common" with draft European Convention of State Immunity); *Hearing on Immunities of Foreign States Before the Subcomm. on Claims and Governmental Relations of the House Comm. on the Judiciary*, Serial No. 10, 93d Cong., 1st Sess. 18 (testimony of Charles Brower, Acting Legal Adviser) (1973) ("the statute has been drafted keeping in mind what we believe to be the general state of the law internationally, so that we conform *fairly closely*, we believe, to our accepted international standards") (emphasis added).

[20] Reply Brief for the United States on Petition for Rehearing at 5 n.6 (noting one "very explicit difference between the FSIA and the statutes of other nations"—to wit, that the sovereign immunity statutes of some nations "require the tortious *act* to occur within their territory, whereas, under the FSIA it is enough if the tortious *injury* occurs in the United States") (emphasis in original). The United States offered the court an example drawn from note 1 to Section 454 of the *Restatement (Revised), Foreign Relations Law of the United States* (Tent. Draft No. 2, p. 191) (1981), which observes that

> "a claim arising from an injury in the United States caused by the malfunction of a defective product manufactured abroad by a foreign state instrumentality would be subject to jurisdiction in the United States under [Section 1605(a)(5)]; under the European Convention and the British Act, the court would apparently have jurisdiction only if the product had been manufactured in the forum state."

[21] *See, e.g.*, Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95; Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820, 596 U.N.T.S. 261.

both criminal offenses and torts occurring on embassy premises. [22] Second, the torts here unquestionably involve a type of conduct for which international law permits one country to hold another accountable regardless of where the conduct occurred. Seizing and detaining diplomatic personnel and embassy premises are universally condemned; Iran's actions in this case have been held by the International Court of Justice at The Hague to violate international law.[23]

Both international law and United States law have long recognized that a nation may exercise jurisdiction over international crimes even when such crimes do not occur in the territory of the forum.[24] And while "states have exercised jurisdiction on the basis of universal interests in the form of criminal laws, . . . international law does not preclude the application of non-criminal law on this basis." [25] The exercise of such jurisdiction is grounded not only in the universal nature of the offenses involved but in the fundamental right of every state to attach legal consequences to conduct of a foreign state when that conduct threatens its security, regardless of where the conduct occurs.[26]

The Court of Appeals' construction of the FSIA on rehearing is therefore not consistent with relevant international legal principles. At a minimum, international law permits American

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[22] *See United States* v. *Erdos*, 474 F.2d 157 (4th Cir.), *cert. denied*, 414 U.S. 876 (1973); *United States* v. *Pizzarusso*, 388 F.2d 8 (2d Cir.), *cert. denied*, 392 U.S. 936 (1968); *United States* v. *Archer*, 51 F. Supp. 708 (S.D. Cal. 1943).

[23] *Case Concerning United States Diplomatic and Consular Staff in Tehran*, 1980 I.C.J. 200, *reprinted in* 19 I.L.M. 553 (1980).

[24] Every nation has jurisdiction, for example, to prescribe and enforce laws against "crimes of universal interest" such as piracy, genocide, hijacking, slave trading, war crimes, and sabotage. *See* F. Sweeney, C. Oliver & N. Leech, *The International Legal System: Cases and Materials* 120-21 (2d ed. 1981).

[25] *Restatement (Revised), Foreign Relations Law of the United States* 404, comment b (Tent. Draft No. 2, p. 115) (1981).

[26] *Restatement (Second), Foreign Relations Law of the United States* § 33(1) (1965).

courts to hear actions arising from international crimes, regardless of where Americans suffered injury as a result.[27] Even if there were any basis for the court's view that allowing tort suits against foreign states for *all* injuries occurring in embassies might be inconsistent with international practice—and there is not—, there is no shadow of a basis for that conclusion when the injury not only occurs in an embassy but also flows from an international crime and a threat to the security of the United States.

Third, the Court of Appeals erred in construing Section 1605(a)(5) as it did to avoid "unhappy consequences" (Pet. App. 10a)—consequences that are, however, entirely speculative and, indeed, most unlikely to occur. The defense of *forum non conveniens* is available to a foreign state, no less than to any other defendant, where appropriate. In addition, there are effective mechanisms available to shield foreign states from being haled before American courts in improper circumstances. Merely as one example, the court speculated that its original reading of the FSIA would permit suits for torts occurring on military bases overseas. But Section 1604 of the FSIA provides that a foreign state's liability under the FSIA is "[s]ubject to existing international agreements to which the United States is a party," and injuries on United States military bases overseas are covered by various Status of Forces agreements. Hence, actions arising from such injuries would be excluded from Section 1605(a)(5)'s coverage by Section 1604.[28]

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[27] *See, e.g., Filartiga* v. *Peña-Irala,* 630 F.2d 876, 885 (2d Cir. 1980); *Fernandez* v. *Wilkinson,* 505 F. Supp. 787, 795-800 (D. Kan. 1980), *aff'd,* 654 F.2d 1382 (10th Cir. 1981).

[28] *See, e.g.,* Art. VIII, ¶¶ 5 & 6, and Art I, ¶ 1(a), *Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces,* June 19, 1951, entered into force August 23, 1953, 4 U.S.T. 1792, T.I.A.S. 2846.

It was expressly contemplated that Section 1604's proviso would encompass such agreements, *see* H.R. Rep. No. 1487, *supra,* at 21, and the fact that Congress found it necessary to exclude torts covered by the Status of Forces agreements is further evidence that the FSIA's definition of "United States" was understood to be broad enough to include overseas areas under United States jurisdiction.

The court's conclusion that Iran is immune from Sergeant Persinger's claims represents a flat misreading of the FSIA. It is a misreading with drastic implications not only for Sergeant Persinger and other former hostages, but for all who may suffer injuries on territory "subject to the jurisdiction of the United States" due to the tortious conduct of a foreign state. Review on this issue should therefore be granted.

II.

The Court Should Review the D.C. Circuit's Determination That the FSIA Does Not Permit Suits Against a Foreign State for Injuries Suffered in the United States Unless the Tortious Conduct Causing the Injuries Also Occurred Here.

In construing the FSIA to bar the claims of Sergeant Persinger's parents—claims that do not depend on how Section 1603(c)'s definition of "United States" is construed—the Court of Appeals disregarded the unambiguous language of Section 1605(a)(5) and the construction urged by the United States.[29] Moreover, the evidence of legislative intent on which the court instead relied not only was dismissed by the United States below; in fact, upon analysis it disappears entirely.

Section 1605(a)(5) provides that a foreign state is not immune from damage actions for injuries "occurring in the United States and caused by the tortious act or omission of that foreign state . . . ." Nothing in Section 1605(a)(5) requires that the injurious conduct occur in the United States; the statute requires only that the *injury* be suffered here. As Judge Edwards wrote in dissent, this provision is "unambiguous" and clearly allows the suit by Sergeant Persinger's parents. (Pet. App. 17a.) *See also Restatement (Revised), Foreign Relations Law of the United States* § 454, comment e (Tent. Draft No. 2, p. 191) (1981). The panel majority, however, considered Section 1605(a)(5) "ambiguous on this point" (Pet. App. 14a), and therefore searched for Section 1605(a)(5)'s meaning in extrinsic sources. But what the majority found cannot withstand scrutiny.

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[29] See page 6 & note 7, above.

First, the legislative history confirms that Congress intended to permit damage suits against a foreign state for injuries occurring in the United States, regardless of where the tortious conduct occurred. The original version of Section 1605(a)(5) considered by Congress in 1973—then designated Section 1605(5)—*would* have required that, to be actionable, the injury must have been "caused by the negligence or wrongful act or omission in the United States of that foreign state."[30] Instead, Congress enacted Section 1605(a)(5) in 1976, omitting any such requirement.

In construing Section 1605(a)(5) to require that, to be actionable, a foreign state's torts must occur in the United States, the Court of Appeals majority relied on language from the House Report accompanying Section 1605(a)(5), which states that, to be actionable, the tortious conduct "must occur within the jurisdiction of the United States . . . ." (Pet. App. 15a, *quoting* H.R. Rep. No. 1487, *supra*, at 21.) The difficulty with the majority's reliance on this language from the 1976 House Report is that it describes the 1973 version of Section 1605(a)(5) that Congress never enacted and that was deliberately changed. It was error for the Court of Appeals "to give a reading to the Act that Congress considered and rejected."[31]

The description of Section 1605(a)(5) set forth in the House Report quoted by the Court of Appeals majority was copied verbatim from the Administration analysis submitted with the proposed legislation to Congress in 1975.[32] That analysis was a mark-up of an earlier Administration analysis

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[30] H.R. 3493, *reprinted in Hearing on Immunities of Foreign States Before the Subcomm. on Claims and Governmental Relations of the House Comm. on the Judiciary*, Serial No. 10, 93d Cong., 1st Sess. 2-13 (1973).

[31] *Pacific Gas & Electric Co.* v. *State Energy Resources Conservation & Development Comm'n*, 103 S. Ct. 1713, 1730 (1983).

[32] Section-by-Section Analysis, *reprinted in* 122 Cong. Rec. 17,468 (1976). The analysis of Section 1605(a)(5) was modified only to delete the words "and future," to reflect that the bill, as reported, is subject only to "existing" international agreements.

supplied with the 1973 version of the FSIA.[33] It was prepared during the "final steps," after the bill itself had been revised in a careful and thorough manner.[34] The marked-up analysis supplied by the Administration with the 1975 legislation failed to reflect the substantive difference between new Section 1605(a)(5) and old Section 1605(5). It continued to describe new Section 1605(a)(5) as requiring that "the tortious act or omission [of the foreign state] must occur within the jurisdiction of the United States."[35]

This was plainly careless error, the result of the haste in which the 1975 revised analysis was prepared by the Administration after the legislation itself had been readied for Congress. The Administration had no intention to depart from the terms of the revised bill or to preserve, through the section-by-section analysis, provisions of the 1973 bill that had been changed.[36] The House and Senate Judiciary Committees simply adopted the language of the Administration's analysis verbatim in their reports; and it was this language—language describing the 1973 legislation, retained in the marked-up Administration analysis through an "inadvertent mistake"[37]—that found its way into H.R. Rep. No. 1487 and the opinion of the court below on rehearing.

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[33] Section-by-Section Analysis, *reprinted in* 119 Cong. Rec. 2,217 (1973).

[34] *See* Affidavit of Michael D. Sandler (which appears as Appendix D) ¶¶ 4-5. (Pet. App. 62a-63a.) Mr. Sandler, Special Assistant to the Legal Adviser from 1975 to 1977, describes the circumstances surrounding the preparation of the Administration's analysis of the 1975 proposed legislation.

Petitioners have not before now had occasion or reason to address this issue or to present Mr. Sandler's affidavit, because in the court below the government did not rely on the House Report but, to the contrary, conceded that the statutory language means exactly what it says. The United States quoted the "interesting" language of the House Report on which the Court of Appeals majority relied (Reply Brief for the United States on Petition for Rehearing at 5 n.6). But the United States dismissed the significance of that language in light of the plain terms of Section 1605(a)(5): "The statutory reference to injury," the United States asserted, "was intended in all probability to cover, for example, the negligent production of a product in a foreign country that causes an injury in the United States." (*Id.*)

[35] 122 Cong. Rec. 17,468 (1976). The analysis was revised to reflect the jurisdiction-based definition of the "United States" added in Section 1603(c) of the 1975 proposed legislation. But the analysis was not revised to reflect the substantive change wrought in Section 1605(a)(5).

[36] Sandler Aff. ¶ 5. (Pet. App. 63a.)

[37] *Id.*

Such carelessness is not unprecedented. In *United States* v. *Atlantic Richfield Co.*, 612 F.2d 1132, 1137-38 (9th Cir.), *cert. denied*, 449 U.S. 888 (1980), the Ninth Circuit confronted a similar "hasty mistake" in a verbatim carryover of explanatory language from a 1970 Senate Report to a 1971 Senate Report accompanying the Alaska Native Claims Settlement Act, and therefore disregarded the language because it failed to reflect a change made in the statute as finally enacted.

In light of Section 1605(a)(5)'s unqualified authorization of damage actions against a foreign state for injuries "occurring in the United States," the Court of Appeals had no warrant to look to the provision's legislative history for further insight into the provision's meaning. Moreover, the crucial fact in the legislative history—the deliberate change in the language of the tort section from the 1973 bill to the statute as enacted—demonstrates the error in the court's holding.[38]

Second, the difference in language between Section 1605(a)(2) and Section 1605(a)(5) supports the view that Section 1605(a)(5) permits damage suits against a foreign

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[38] It was on the basis of the House Report's language that the district court in *In re Sedco, Inc.*, 543 F.Supp. 561, 567 (S.D. Tex. 1982)—cited by the Court of Appeals (Pet. App. 14a)—held that, to be actionable under Section 1605(a)(5), a foreign state's torts must occur in the United States. The House Report was also the sole basis on which the Ninth Circuit reached the same conclusion in *Olsen* v. *Government of Mexico*, 729 F.2d 641, 647 (9th Cir. 1984), after the court in this case issued its decision on rehearing. Indeed, the *Olsen* court stated that, but for the House Report, the plain terms of Section 1605(a)(5) would be controlling and "there would be no need to consider the location of the tortious conduct." *Id.* at 646.

The other district court case cited by the Court of Appeals in support of its view that a foreign state's tort must occur here to be actionable in fact declined to decide the FSIA issue. *Frolova* v. *USSR*, 558 F. Supp. 358, 362 (N.D. Ill. 1983). And that court's dictum that "the tortious act or omission of the foreign state [must] occur in the United States" was entirely unsupported, as Judge Edwards observed in dissent. (Pet. App. 17a-18a.)

The Court of Appeals acknowledged that the district courts have split on the issue. *See* Pet. App. 14a, citing *Letelier* v. *Republic of Chile*, 488 F. Supp. 665 (D.D.C. 1980). The district court in *Letelier* held that, even if the tortious acts allegedly committed by Chile were carried out entirely within that country, "that circumstance * * * will not allow it to absolve itself * * * if the actions of its alleged agents resulted in tortious injury in this country." *Id.* at 674.

state for injuries occurring in the United States, regardless of where the wrongful conduct occurred. Section 1605(a)(2) provides that a foreign state "shall not be immune" from the jurisdiction of courts of the United States or of the states in any case—

> "in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere *and that act causes a direct effect in the United States.*" (Emphasis added.)

The Court of Appeals majority reasoned that, since Section 1605(a)(2) expressly permits suits against a foreign state for commercial misconduct abroad if such misconduct causes a "direct effect" in the United States, Section 1605(a)(5), which does not refer to a foreign state's tortious conduct abroad but only to injuries "occurring in the United States," must therefore be "narrower" that Section 1605(a)(2), permitting suits against a foreign state for tortious conduct only if such conduct occurs in the United States. (Pet. App. 15a.)

The majority's approach is wholly unpersuasive. The text of Section 1605(a)(5) does not limit conduct actionable in American courts to conduct that occurs here. Section 1605(a)(2) does contain such a limit—*except* with respect to conduct abroad having a "direct effect" here. There is no such limitation in Section 1605(a)(5); hence no "direct effect" exception is necessary. The difference in language, if relevant at all, argues against rather than in favor of the court's construction. Moreover, the court suggested no reason—and we perceive none—why Congress would have wished to prescribe narrower limits for noncommercial-tort actions than for commercial-tort actions.[39]

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[39] The difference in structure between the two subsections is readily explained by the fact that Section 1605(a)(2) deals with contract as well as tort suits, while Section 1605(a)(5) deals only with suits involving torts.

Third, the Court of Appeals majority erred in concluding that "policy coherence" required it to construe Section 1605(a)(5) to require that, to be actionable, a foreign state's tortious conduct must have occurred in the United States. (Pet. App. 15a.) In the first place, it is not a federal court's role to import policy restrictions into a statute where Congress did not do so. As the Ninth Circuit stated in *Olsen* v. *Government of Mexico,* 729 F.2d 641 (9th Cir. 1984), the language of Section 1605(a)(5) "does not indicate that the conduct causing the tort must . . . occur in the United States"; absent an expression of contrary legislative intent, "this [should] end our inquiry and there [should] be no need to consider the location of the tortious conduct." *Id.* at 646.

Moreover, "policy coherence" does not support the restriction imported into Section 1605(a)(5) by the Court of Appeals majority. The court on rehearing considered that

> "[i]t would be anomalous to say that Congress intended to deny a remedy to [Sergeant Persinger]—a hostage imprisoned and physically abused for more than a year—and yet also intended to expose Iran to a suit by his parents for their emotional distress." (Pet. App. 14a.)[40]

But, as Judge Edwards observed in dissent,

> "Congress might easily have determined to give American courts jurisdiction over claims for damages caused by tortious acts or omissions occurring outside the United States only to the extent that those acts or omissions produce effects within the United States." (Pet. App. 18a.)

In addition, the broad question whether injury in the United States is sufficient for FSIA jurisdiction, or whether tortious conduct here is also required, can hardly turn on policy considerations that concern only the rare situation where, as

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[40] Any apparent "anomaly" in this case would disappear, of course, if injuries inflicted on Sergeant Persinger on United States embassy premises in Tehran were deemed to be injuries "occurring in the United States" for purposes of Section 1605(a)(5). See Part I, above.

here, the same tortious conduct injures victims both inside and outside the United States, strictly defined, and the harm to the second is greater than the harm to the first. Congress could hardly have had such a particularized "double victim" situation in the front of its mind in determining which general jurisdictional test to enact. The court's holding is of general applicability; it is radically unsound for such a holding to turn on the unusual circumstances of this case.[41]

For these reasons, the court's conclusion that Iran is immune from suit by Sergeant Persinger's parents directly subverts the purposes and objectives of Congress in enacting Section 1605(a)(5), and precludes a broad variety of suits for injuries caused here by torts committed abroad that the United States agreed in the court below should be actionable. Review on this issue is therefore also warranted.

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[41] A far more likely type of policy consideration to have animated Congress was that suggested by the United States in its reply brief on rehearing. (See page 17, note 34, above.) Another scenario of likely concern to Congress would involve an employee or agent of Canada or Mexico who fires a shot across the border and kills some one here. Under the language of Section 1605(a)(5), Canada or Mexico would be suable in our courts; under the majority's rewriting of that section, it would not be.

CONCLUSION

For these reasons, the petition should be granted and the judgment reversed.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-2003

GREGORY ALLEN PERSINGER, et al., APPELLANTS

v.

ISLAMIC REPUBLIC OF IRAN, et al.

Appeal from the United States District Court
for the District of Columbia
(Civil Action No. 81-00230)

On Petition for Rehearing

Argued May 19, 1983

Decided March 13, 1984

Michael F. Hertz, Department of Justice, with whom *J. Paul McGrath*, Assistant Attorney General, *Stanley S. Harris*, United States Attorney (at the time the brief was filed), *Robert E. Kopp*, Attorney, Department of Justice, and *Jonathan B. Schwartz*, Attorney, Department of State, were on the brief for appellee, United States. *Theodore C. Hirt*, Attorney, Department of Justice also entered an appearance for United States.

Brice M. Clagett with whom *Paul G. Gaston* and *Harold Hongju Koh* were on the brief for *amicus curiae*, FLAG, Inc., opposing modification of original opinion.

Peter J. Neeson, of the Bar of the Supreme Court of Pennsylvania, *pro hac vice*, by special leave of the Court, with whom *Mark H. Tuohey, III*, was on the brief, for appellants.

Thomas G. Shack, Jr. and *Thomas D. Silverstein* entered appearances for appellee, Islamic Republic of Iran.

Before: EDWARDS and BORK, *Circuit Judges*, and BAZELON, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* BORK.

Opinion dissenting in part and concurring in part filed by *Circuit Judge* EDWARDS.

BORK, *Circuit Judge*: This is an action for damages against the Islamic Republic of Iran for injuries inflicted by the seizure and detention of American hostages. Appellants, plaintiffs below, are a former hostage and his parents. On October 8, 1982, we issued an opinion affirming the district court's dismissal of appellants' claims. There, we held the defense of sovereign immunity inapplicable but decided that appellants had failed to state a claim upon which relief could be granted. Specifically, we held that the executive order signed by President Carter, pursuant to an agreement with Iran to secure the release of the hostages, lawfully and effectively extinguished appellants' claims against Iran.

Though the United States, which had intervened as a party-defendant in order to meet its obligations under the executive agreement with Iran, *see American International Group, Inc.* v. *Islamic Republic of Iran*, 657 F.2d 430, 433 (D.C. Cir. 1981), prevailed, the government was sufficiently concerned about our ruling on the question of sovereign immunity to petition the panel for rehearing on that issue. We granted the petition, and now affirm the judgment of the district court on that court's alternate ground: Iran enjoys sovereign immunity and that

immunity has not been lifted for the acts involved here by the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602 *et seq.* (1976) ("FSIA" or "Act"). This conclusion also requires that we vacate our prior opinion.

I.

Gregory Allen Persinger is a United States Marine, who, on November 4, 1979, was stationed at the United States Embassy in Tehran, Iran. On that date, the Embassy was seized by Iranian militants, and the Embassy's personnel, including Sergeant Persinger, were captured and held hostage. This act, which was not merely hostile to the United States but unprecedented in the history of international relations, at once created a crisis between the United States and Iran. The United States tried to secure the release of the hostages through a series of stringent retaliatory measures, but all such efforts failed.[1]

Ultimately, the United States was able to obtain the hostages' freedom only by an executive agreement with Iran that necessarily made concessions to that country. Since diplomatic relations with Iran had been severed, the agreement was embodied in two Declarations of the Government of Algeria, initialed for the United States by Deputy Secretary of State Warren M. Christopher on January 19, 1981. The hostages, including Sergeant Persinger, were released the following day, having been held captive for almost fifteen months.[2]

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[1] The President declared a national emergency and issued an executive order blocking Iran's threatened removal or transfer of all Iranian assets in this country. The United States and other nations imposed trade sanctions upon Iran. The United States took its case to the International Court of Justice at the Hague, which declared Iran's actions to be in violation of international law. Case Concerning United States Diplomatic and Consular Staff in Tehran (United States v. Iran), 1980 I.C.J. 200, *reprinted in* 19 I.L.M. 553 (1980). Finally, the United States attempted a military rescue operation that cost several American lives.

[2] The executive agreement purported to extinguish all hostage claims against Iran but the effectiveness of that ex-

Sergeant Persinger and his parents brought suit in the district court against the Islamic Republic of Iran on February 2, 1981, alleging numerous violations of treaties and of international, constitutional, and common law. The United States moved to dismiss the complaint. After a hearing, District Judge Oberdorfer granted the government's motion. *Persinger* v. *Islamic Republic of Iran*, Civ. No. 81-00230 (D.D.C. Aug. 21, 1981). Relying on *Dames & Moore* v. *Regan*, 453 U.S. 654 (1981), the district court held that "the President may dispose of private claims against foreign states to resolve, or avoid, international crises." *Persinger* v. *Islamic Republic of Iran*, slip op. at 2. (In *Dames & Moore*, the Supreme Court upheld the legality of a different excutive order issued as part of the effort to carry out the Algerian Declaration.) The district court held, in the alternative, that even in the absence of a valid executive order, Iran would be immune under the Foreign Sovereign Immunities Act from suit for tortious acts in the United States Embassy in Tehran. This appeal followed.[3]

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tinguishment need not be decided since Iran, in any event, is immune from this tort action.

[3] In Williams v. Iran, No. 81-1672 (D.C. Cir. Oct. 19, 1982), and Lauterbach v. Iran, No. 81-1676 (D.C. Cir. Oct. 19, 1982), this Court affirmed lower court judgments dismissing plaintiffs' claims against Iran "for the reasons stated in *Persinger* v. *Islamic Republic of Iran*, No. 81-2003, decided by this Court on October 8, 1982." *See also* Moeller v. Islamic Republic of Iran, No. 80-1171 (D.D.C. Aug. 5, 1981) (no appeal taken). Between the date on which we heard oral argument on this petition, and today the Ninth Circuit considered the same issue that is before us, McKeel v. Islamic Republic of Iran, 722 F.2d 582 (9th Cir. 1983), and concluded, as we do, that sovereign immunity bars appellants' suits from going forward. *Id.* at 589. We refer to that opinion where appropriate.

Currently, two cases against the United States by former hostages seeking compensation for extinguishment of their claims against Iran are pending in the United States Claims

II.

A.

In its initial submissions, the government contended that we need not reach the issue of Iran's sovereign immunity—and of this court's jurisdiction—if we decide that President Carter had the power lawfully to extinguish the Persingers' claims. Brief for the United States at 22. We disagree. The Act expressly deprives a court of jurisdiction over any party entitled to sovereign immunity. 28 U.S.C. § 1604 (1976) ("[A] foreign state shall be immune *from the jurisdiction of the courts* of the United States . . . .") (emphasis added); *see Texas Trading & Milling Corp.* v. *Federal Republic of Nigeria*, 647 F.2d 300, 306-07 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982); *cf. Tuck* v. *Pan American Health Organization*, 668 F.2d 547, 549 (D.C. Cir. 1981) (immunity issue must be addressed before merits). Since we decide that in this case Iran is not subject to this court's jurisdiction, it would be improper for us to reach the question of the President's authority over these claims.[4] To exceed the jurisdictional limits of a court's power is to exercise authority illegitimately, *Insurance Corp. of Ireland, Ltd.* v. *Campagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982). For that reason we decide jurisdiction first, and our conclusion that jurisdiction is absent means that we cannot let our prior opinion on the merits stand.

Court. Cooke v. United States, No. 581-82C (Ct. Cl.); Amburn-Lijek v. United States, No. 564-82C (Ct. Cl.). The Claims Court has stayed its consideration of the merits of the hostages' claims in both *Cooke* and *Amburn-Lijek* pending the disposition of the rehearing in this case. Cooke v. United States, No. 581-82C (Ct. Cl. Mar. 3, 1983) (denying motion for class certification).

[4] That precept is embodied in Fed. R. Civ. P. 12(h)(3): "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."

Foreign states are generally immune from the jurisdiction of federal and state courts. 28 U.S.C. § 1604. *See The Schooner Exchange* v. *McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812). The FSIA, however, creates a number of exceptions to this immunity. 28 U.S.C. § 1605. One exception provides that:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—
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> . . . .
>
> (5) . . . in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; . . . .

28 U.S.C. § 1605(a)(5). The "United States" is defined to include "all territory and waters, *continental or insular*, subject to the jurisdiction of the United States." 28 U.S.C. § 1603(c) (emphasis added). Thus, if a foreign state's "act[s] or omission[s]" cause tortious injury within the United States, as defined in section 1603(c), the foreign state's immunity is abrogated, subject to the exceptions set out in section 1605(a)(5), and there can be both subject matter and personal jurisdiction in United States courts. 28 U.S.C. § 1330(a), (b).

That Congress has the power to exercise jurisdiction over certain activities at U.S. embassies abroad is not disputed. *Agee* v. *Muskie*, 629 F.2d 80, 111 (D.C. Cir.) (MacKinnon, J., dissenting) (United States embassy is under concurrent jurisdiction of United States criminal laws), *rev'd on other grounds sub nom. Haig* v. *Agee*, 453 U.S. 280 (1980); *see also* Brief for the United States at 22-23.[5] The issue before this court, then, is whether Con-

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[5] The government maintains that subjecting a foreign state to jurisdiction for acts on United States embassy premises

gress, in enacting the FSIA, intended to exercise its jurisdiction to give courts in this country competence to hear suits against foreign states for torts committed on United States embassy premises abroad. That issue turns upon the question whether United States embassies are within the definition of "United States" set forth in section 1603(c). The government contends that the FSIA was intended to abrogate sovereign immunity only for torts within the exclusive territorial jurisdiction of the United States.[6] It is contended, on the other side, that since embassies are "substantially removed from the jurisdiction of the receiving state," Brief of *Amicus Curiae* FLAG, Inc. on Rehearing at 7,[7] and are subject to the concurrent jurisdiction of both sending and receiving states, Iran is not shielded by sovereign immunity from liability for torts at the United States Embassy in Tehran, Iran. *Id.* We are persuaded by the language of the statute, its legislative history, and by the consequences of adopting a contrary position that section 1605(a)(5) does not remove Iran's immunity here.

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abroad "might well create a serious danger of conflict with the Fifth Amendment due process clause." Brief for the United States on Rehearing at 10. Since we hold that Congress did not intend to exercise jurisdiction in a case such as this one, we need not reach the question of Congress' constitutional power to exercise such jurisdiction.

[6] This is the conclusion that, except for this Court's initial determination, every other court which considered the question has reached. *See* McKeel v. Iran, 722 F.2d 582 (9th Cir. 1983); Persinger v. Iran, No. 81-00230 (D.D.C. Aug. 21, 1981); Moeller v. Iran, No. 80-1171 (D.D.C. Aug. 5, 1981); Lauterbach v. Iran, No. 81-0350 (D.D.C. June 11, 1981); Williams v. Iran, No. 79-3295 (D.D.C. 1981).

[7] Sergeant Persinger and his parents, plaintiffs below, have, in this rehearing, substantially deferred to counsel for FLAG, Inc. They have stated to this court that "with regard to the issues presently pending before this Court, the interests of the appellants and FLAG are identical." Brief for Appellants on Rehearing at vii, 1. Accordingly, we cite to FLAG's briefs as if they were appellants' own.

In section 1603(c), Congress used the words "continental or insular" to modify the scope of the phrase "all territory and waters . . . subject to the jurisdiction of the United States." The latter phrase, if it stood alone, might lead to the conclusion that any territory over which the United States exercises any form of jurisdiction constitutes the "United States" for purposes of the FSIA. Since the United States has some jurisdiction over its Embassy in Iran, it would then follow that Iran had no immunity for tortious acts committed on the Embassy grounds. We think, however, that the modifying words make this construction too awkward to be countenanced. If the definition meant all territory subject to any form of United States jurisdiction, the words "continental or insular" would be surplusage: all territory is continental or insular. The modifying phrase is rather clearly intended to restrict the definition of the United States to the continental United States and such islands as are part of the United States or are its possessions. The ground upon which our Embassy stands in Tehran does not fall within that definition. Hence, Congress intended that, under the statute, Iran should retain its sovereign immunity in this case.

Though the legislative history of the FSIA does not address directly the meaning of "territory . . . subject to the jurisdiction of the United States," *see, e.g.*, H.R. Rep. No. 1487, 94th Cong., 2d Sess. 16 (1976) ("House Report"); S. Rep. No. 1310, 94th Cong., 2d Sess. 15 (1976), the focus of Congress' concern strongly suggests that the conclusion we have drawn from the statute's language is correct. Congress' principal concern was with torts committed in this country. The House Report makes clear that "Section 1605(a)(5) is *directed primarily at the problem of traffic accidents* but is cast in general terms as applying to all tort actions for money damages . . . ." House Report at 20-21 (emphasis added). Similarly, many of those testifying about the purpose and effect of the FSIA stressed the territorial limitation of the Act.

See, e.g., Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary, 94th Cong., 2d Sess. 27 (1976) (testimony of State Department Legal Advisor Monroe Leigh that proposed section 1605(a)(5) "would govern automobile accident cases and other tort actions. It would deny the defense of sovereign immunity with respect to many torts that *occur in the United States*" (emphasis added)); *id.* at 58 (testimony of Peter D. Trooboff) (FSIA eliminates immunity, for example, for "the negligent operation of a motor vehicle . . . in the District of Columbia"); *id.* at 95 (testimony of Michael M. Cohen) (section 1605(a)(5) "removes the defense [of immunity] for most tort suits arising here").

Moreover, at the 1973 hearings to the predecessor bill—which, although not passed, was "essentially the same . . . except for [some] technical improvements,"[8] House Report at 10—one of the Act's principal draftsmen, Bruno Ristau, testified that:

> We would like, based on our experience as a litigant abroad to subsume to the jurisdiction of our domestic courts foreign governments and foreign entities who engage in certain activities *on our territory* to the same extent that the U.S. Government is already at the present time subject to the jurisdiction of foreign courts, when it engages in certain activities *on their soil.*
>
> . . . .
>
> [W]e would like to afford *our local citizens* and entities who deal with foreign governments *in the United States* effective redress through the instrumentality of our courts. If a dispute arises as a

[8] Although the predecessor to the Act did not contain a definition of the "United States," there is no indication in the legislative history of the 1976 Act that the addition of section 1603(c) defining the jurisdiction of the United States was intended to expand the scope of the statute's exceptions.

> result of an activity which a government carries on *in this country*, the most appropriate place to resolve such a dispute would be through the courts . . . .

Immunities of Foreign States: Hearings on H.R. 3493 Before the Subcomm. on Claims and Governmental Relations of the House Comm. on the Judiciary, 93d Cong., 1st Sess. 29 (1973) (testimony of Bruno Ristau) (emphasis added).

In enacting the FSIA, Congress intended to "bring U.S. practice into conformity with that of most other nations." House Report at 12. Our reading of the "United States," as modified by the terms "continental or insular," is, therefore, reinforced by the fact that codifications by other nation-states and international organizations—with which Congress sought to be consistent—have provided that a state loses its sovereign immunity for tortious acts only where they occur in the territory of the forum state. Brief for the United States on Rehearing at 15-16, and statutes cited therein.[9]

Another reason for finding that sovereign immunity exists here is the series of unhappy consequences that would follow if we read section 1603(c) broadly to cover areas in which the United States had jurisdiction of any sort. These consequences would entail not only serious inconvenience and injustice but also embarrassment to our foreign relations. We offer these considerations not as policies we choose but as throwing light on congressional

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[9] Appellants contend that the Vienna Convention on Diplomatic Relations, by endorsing the rule of inviolability, and by substantially removing a foreign embassy from the jurisdiction of the receiving state, establishes that the United States exercises concurrent jurisdiction over embassy premises. Brief of *Amicus Curiae* FLAG, Inc. on Rehearing at 21-23. Inviolability, by itself, however, does not equal extraterritoriality. Moreover, the thrust of our holding here is that Congress, in enacting the FSIA, did not intend to exercise whatever power it may have over a foreign sovereign's tortious acts committed at U.S. embassy premises abroad.

intent. If Congress had meant to remove sovereign immunity for governments acting on their own territory, with all of the potential for international discord and for foreign government retaliation that that involves, it is hardly likely that Congress would have ignored those topics and discussed instead automobile accidents in this country.

One such consequence is that a decision abrogating sovereign immunity for torts on embassy premises would, as the government points out, be the "functional equivalent" of making U.S. embassies part of U.S. territory "for jurisdictional purposes." Brief for the United States on Rehearing at 28. Such a result could, for example, cause the French government to be subject to suit in the United States if a French government vehicle were involved in an automobile accident on the U.S. embassy grounds in West Germany. *Id.* at 29. Furthermore, foreign states "might hesitate in providing services to U.S. embassies or consulates" were they to be subject to suit in U.S. courts for negligent acts or omissions on those premises. *Id.*[10] In addition, since some foreign states base their sovereign

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[10] Appellants argue that the "discretionary function" exception to tort liability would shield foreign governments from liability in the examples posited by the government. Brief of *Amicus Curiae* FLAG, Inc. on Rehearing at 42-44. This is not so. One of the express purposes of the Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2671 *et seq.* (1976)—the act where the discretionary function was first set forth—is to permit suits for torts arising out of automobile accidents with U.S. government vehicles. Dalehite v. United States, 346 U.S. 15, 28 (1953). Moreover, the "discretionary function" exception has not shielded the United States from liability for torts committed while providing fire and police services—the very "services" the government argues that foreign states might hesitate to provide were we to limit their immunity for torts on embassy premises. *See, e.g.*, Rayonier Inc. v. United States, 352 U.S. 315, 317-19 (1957) (United States could be held accountable for the negligence of its firefighters); Downs v. United States, 522 F.2d 990, 997 (6th Cir. 1975) (United States could be liable for FBI agent's negligence in attempt to stop a hijacking).

immunity decisions on reciprocity, or parity of reasoning, it is possible that a decision to exercise jurisdiction in this case would subject the United States to suits abroad for torts committed on the premises of embassies located here. 6 M. Whiteman, *Digest of International Law* 580-82 (1968).

A principle revoking sovereign immunity on our embassy grounds abroad would also, presumably, have the same effect as to our military and naval bases around the world, since the United States exercises jurisdiction in such locations. The possibilities are almost endless for tort suits in this country against foreign governments for acts or omissions all over the world. We are persuaded that Congress intended nothing of the sort. Embassies may be, as appellants argue, unique in their inviolability but that does not distinguish them from military facilities, libraries, AID missions, and the like with respect to the criteria of the statute. If the controlling question were only whether the United States had some jurisdiction, all premises controlled by this country anywhere in the world would fit the statutory definition of the "United States." Fidelity to the statutory language would prevent us from picking and choosing among premises subject to some extent of congressional control.

Appellants rely heavily on two criminal cases, *United States* v. *Pizzarusso*, 388 F.2d 8 (2d Cir.), *cert. denied*, 392 U.S. 936 (1968), and *United States* v. *Erdos*, 474 F.2d 157 (4th Cir.), *cert. denied*, 414 U.S. 876 (1973), to support their contention that the United States "may assert jurisdiction over activities occurring on the premises of United States embassies abroad." Brief of *Amicus Curiae* FLAG, Inc. on Rehearing at 14. In *Pizzarusso*, the Second Circuit held that Congress had the power to give federal courts jurisdiction over a visa applicant who, in an attempt to gain entry into the United States, perjured herself at the American Consulate in Canda. And in *Erdos*, the Fourth Circuit held that Congress had ex-

ercised its power to proscribe the killing of an American citizen by another American citizen within a foreign diplomatic compound. These cases are inapposite. *McKeel* v. *Islamic Republic of Iran*, 722 F.2d 582, 588-89 & n.9 (9th Cir. 1983). Neither involved the exercise of jurisdiction over a foreign sovereign. The question here, as in *Erdos*, is not the raw power of Congress to provide jurisdiction; rather, the problem is one of intention, *i.e.*, statutory construction. *Erdos*, 474 F.2d at 159. We do not think that Congress intended to abrogate the immunity generally enjoyed by a foreign sovereign for tortious acts at embassies within its own territory.[11]

B.

The claims brought by Sergeant Persinger's parents present a variation on the issue just discussed. They seek to recover for mental and emotional distress suffered within the continental United States. Such injuries are

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[11] In addition, jurisdiction in each of these cases was based on a statute defining jurisdiction for the purpose of the title dealing with federal crimes only—18 U.S.C. § 7 (1982), which covers the "special maritime and territorial jurisdiction of the United States"—as well as on different theories of jurisdiction. The *Pizzarusso* court expressly invoked the "protective" theory of jurisdiction, that "a state 'has jurisdiction to prescribe a rule of law attaching legal consequences to conduct outside its territory that threatens its security as a state or the operation of its governmental functions, provided the conduct is generally recognized as a crime under the law of states that have reasonably developed legal systems.'" *Restatement (Second) of Foreign Relations Law of the United States* § 33 (1965), *quoted in Pizzarusso*, 388 F.2d at 10. Although the Fourth Circuit in *Erdos* did not explicitly label the head of jurisdiction that Congress had exercised to proscribe the conduct in that case, the result can be read as based on the "nationality" principle—the exercise of jurisdiction over U.S. nationals. But *Erdos* is inapposite primarily for the reason set forth above—that Congress did not intend the FSIA to apply to the case before us, whereas Congress did intend the "special maritime and territorial jurisdiction of the United States" to cover the case before the *Erdos* court.

said to be actionable because section 1605(a)(5) requires only that the injury be suffered in the United States but does not require that the tortious act or omission occur here.

Section 1605(a)(5) is ambiguous on this point. It states that immunity is removed in actions "for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission" of a foreign state. It is thus unclear whether both the tort and the injury must occur here or whether the tort may occur abroad and be actionable so long as the injury is suffered here. *Compare Frolova* v. *Union of Soviet Socialist Republics*, 558 F. Supp. 358, 362 (N.D. Ill. 1983) (act or omission must occur in the United States), and *In re Sedco, Inc.*, 543 F. Supp. 561, 567 (S.D. Tex. 1982), *with Letelier* v. *Republic of Chile*, 488 F. Supp. 665, 674 (D.D.C. 1980) (only tortious injury need occur in the United States). *See generally, McKeel* v. *Islamic Republic of Iran*, 722 F.2d at 589-90 n.10. The ambiguity goes no deeper than the surface of the text, however, for the briefest consideration of the purposes of the statute shows that the first alternative must be chosen: both the tort and the injury must occur in the United States.

We have shown that the proper construction of the statute deprives the district court of jurisdiction to entertain Sergeant Persinger's claim. Iran is immune from tort suits here for actions taken by it on its own territory. It would be anomalous to say that Congress intended to deny a remedy to him—a hostage imprisoned and physically abused for more than a year—and yet also intended to expose Iran to a suit by his parents for their emotional distress. Indeed, appellants' argument would have the result that had one hostage died in Tehran and another been released and died in the United States, both deaths being due to injuries inflicted while they were held hostage, the district court would have jurisdiction over

the second suit but not over the first. Such results would deprive the statute of any policy coherence.

Our reading of the statute is further supported by the following passage in the House Report:

> It [section 1605(a)(5)] denies immunity as to claims for personal injury or death, or for damage to or loss of property, caused by the tortious act or omission of a foreign state or its officials or employees, acting within the scope of their authority; *the tortious act or omission must occur within the jurisdiction of the United States* . . . .

House Report at 21 (emphasis added).

Moreover, a comparison of the noncommercial tort exception—section 1605(a)(5), under which this suit was brought—with the commercial activity exception, section 1605(a)(2), demonstrates that Congress intended the former to be narrower than the latter. The commercial activity exception expressly provides that a foreign sovereign's commercial activities "outside the territory of the United States" having a "direct effect" inside the United States may vitiate the sovereign's immunity. Any mention of "direct effect[s]" is noticeably lacking from the noncommercial tort exception. When Congress uses explicit language in one part of a statute to cover a particular situation and then uses different language in another part of the same statute, a strong inference arises that the two provisions do not mean the same thing. *See Russello* v. *United States*, 104 S. Ct. 296, 300 (1983); *United States* v. *Martino*, 681 F.2d 952, 954 (5th Cir. 1982) (en banc), *quoting United States* v. *Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972). Section 1605(a)(5) does not contain the "direct effect[s]" language of section 1605(a)(2), and therefore does not support jurisdiction over the parents' tort claims.[12]

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[12] Appellants also claim that the attack on the embassy was an "international crime" over which "every nation has juris-

For the reasons stated, we have concluded that the FSIA shields Iran from liability and this court has no jurisdiction over the claims of appellants Jacqueline and Lawrence Persinger, and their son, Sergeant Gregory Persinger. Our prior opinion is therefore vacated, and the judgment of the district court is

Affirmed.

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diction to prescribe and enforce." Brief of *Amicus Curiae* FLAG, Inc. on Rehearing at 56. In addition, the United States could invoke the "protective principle" to exercise jurisdiction over Iran in this case. *Id.* at 57. There can be no doubt that Iran's actions were international crimes. *See* Case Concerning United States Diplomatic and Consular Staff in Tehran (United States v. Iran), 1980 I.C.J. 200, *reprinted in* 19 I.L.M. 553 (1980). The heinousness of Iran's actions, however, is not sufficient to give this court jurisdiction to hear the plaintiffs' claims. Neither the substantive basis of the tort, nor the seriousness of the crime, is relevant to the question of jurisdiction. The FSIA, as the expression of Congress, applies to deprive us of jurisdiction.

EDWARDS, *Circuit Judge*, dissenting in part and concurring in part: I concur in the result in Part II.A, but I dissent from the rationale and holding of Part II.B.

Part II.B holds that 28 U.S.C. § 1605(a)(5) (1976) does not apply to Persinger's parents' claim for damages against Iran for mental and emotional distress suffered within the United States and caused by the seizure and detention of their son in Iran. Section 1605(a)(5) provides, in pertinent part, that a foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case

> in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment . . . .

I find the language of this provision unambiguous and clearly applicable on its face to the parents' claim. In particular, the statute plainly requires that *only the injury*, and not the tortious act or omission, occur in the United States. I see no reason to resort to the legislative history to clarify the plain language of the statute. Congress never enacted the language of the House Report that "the tortious act or omission must occur within the jurisdiction of the United States." H.R. REP. NO. 1487, 94th Cong., 2d Sess. 21 (1976).

Moreover, I do not find that the case law persuasively supports the reading of the statute adopted in the majority opinion. Only one case, *In re Sedco, Inc.*, 543 F. Supp. 561, 567 (S.D. Tex. 1982), holds that the tortious act or omission must occur in the United States. The *Sedco* court reached its conclusion primarily on the basis of the language of the House Report. A second case cited in the majority opinion, *Frolova v. Union of Soviet So-*

cialist Republics, 558 F. Supp. 358, 362 (N.D. Ill. 1983), merely states, without any analysis, that the tortious act or omission must occur in the United States. That statement is *pure dictum* because the court expressly declined to decide the Foreign Sovereign Immunities Act issue.

I am also not convinced that it is anomalous to allow Persinger's parents to recover damages for mental and emotional injuries suffered by virtue of their son's confinement, but not to allow Persinger himself to recover damages for his own confinement. As a policy matter, Congress might easily have determined to give American courts jurisdiction over claims for damages caused by tortious acts or omissions occurring outside the United States only to the extent that those acts or omissions produce effects within the United States.

Finally, I am not convinced that the "direct effect" language of section 1605(a)(2) compels the reading of section 1605(a)(5) adopted in the majority opinion. There is nothing in the legislative history to support this view and one might as easily assume that Congress intended to restrict jurisdiction more in cases involving commercial activity not carried on in the United States than in cases involving noncommercial torts.

My main point of dissent is that the clear terms of the statute allow for the parents' claim. I do not think that we are at liberty to decide otherwise on "policy grounds."

APPENDIX B

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-2003

GREGORY ALLEN PERSINGER, ET AL., APPELLANTS

v.

ISLAMIC REPUBLIC OF IRAN, ET AL.

Appeal from the United States District Court
for the District of Columbia
(D.C. Civil Action No. 81-00230)

Argued April 26, 1982
Decided October 8, 1982

Julian N. Eule of the bar of the Supreme Court of Pennsylvania pro hac vice by special leave of Court with whom *Mark H. Tuohey, III* was on the brief, for appellants.

Michael F. Hertz, Attorney, Department of Justice with whom *Charles F.C. Ruff*, United States Attorney at the time the brief was filed, *Robert E. Kapp* and *Theodore*

C. Hirt, Attorneys, Department of Justice were on the brief, for United States.

Thomas G. Shack, Jr., *Christine Cook Nettesheim* and *Thomas D. Silverstein* were on the brief, for appellee, The Islamic Republic of Iran.

Brice M. Clagett and *Paul G. Gaston* were on the brief, for amicus curiae, Flag, Inc., urging the Court to limit any affirmance of the dismissal order.

Before: EDWARDS and BORK, *Circuit Judges*; BAZELON, *Senior Circuit Judge*

Opinion for the court filed by *Circuit Judge* BORK.

BORK, *Circuit Judge*: This is an action for damages against the Islamic Republic of Iran for injuries inflicted by the seizure and detention of American hostages. Appellants, plaintiffs below, are a former hostage and his parents. The question before this court is whether an executive order signed by President Carter, pursuant to an agreement with Iran to secure the release of the hostages, lawfully and effectively extinguished appellants' claims against Iran. We conclude that the executive order does so and therefore affirm the district court's ruling that appellants have failed to state a claim upon which relief can be granted.

BACKGROUND

Gregory Allen Persinger is a United States Marine who on November 4, 1979, was stationed at the United States Embassy in Tehran, Iran. On that date, the Embassy was seized by Iranian militants, and the Embassy's personnel, including Sergeant Persinger, were captured and held hostage. This act, which was not merely hostile to the United States but unprecedented in the history of international relations, at once created a crisis between the United States and Iran. The United States tried to secure

the release of the hostages through a series of stringent retaliatory measures, but all such efforts failed.[1]

Ultimately, the United States was able to obtain the hostages' freedom only by an executive agreement with Iran that necessarily made concessions to that country. Since diplomatic relations with Iran had been severed, the agreement was embodied in two Declarations of the Government of Algeria, initialed for the United States by Deputy Secretary of State Warren M. Christopher on January 19, 1981. The hostages, including Sergeant Persinger, were released the following day. They had been captives for almost fifteen months.

In the first Declaration, the parties stated that it was their purpose to

> terminate all litigation as between the Government of each party and the nationals of the other, and to bring about the settlement and termination of all such claims through binding arbitration. . . . [T]he United States agrees to terminate all legal proceedings in United States courts involving claims of United States persons and institutions against Iran . . ., to nullify all attachments and judgments obtained therein, to prohibit all further litigation based on such claims, and to bring about the termination of such claims through binding arbitration.[2]

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[1] The President declared a national emergency and issued an executive order blocking Iran's threatened removal or transfer of all Iranian assets in this country. The United States and other nations imposed trade sanctions upon Iran. The United States took its case to the International Court of Justice at the Hague, which declared Iran's actions to be in violation of international law. Case Concerning United States Diplomatic and Consular Staff in Tehran (United States v. Iran), 1980 I.C.J. 200, *reprinted in* 19 *International Legal Materials* 553 (1980). Finally, the United States attempted a military rescue operation that cost several American lives.

[2] Declaration of the Government of the Democratic and Popular Republic of Algeria, General Principle B, *reprinted*

In the second Declaration, the parties established an international arbitral tribunal—the Iran-United States Claims Tribunal—to settle, *inter alia*, claims of United States nationals against Iran.[3] The Declaration specifically excepted from the tribunal's jurisdiction, however, claims against Iran relating to the seizure of the Embassy and the detention of the hostages.[4] Thus, the executive agreement was clearly intended to extinguish in all possible forums the claims, both existing and potential, of United States hostages and their families.

In a series of executive orders signed on January 19, including Executive Order No. 12283, President Carter directed the Secretary of the Treasury to promulgate regulations implementing the executive agreement with Iran. By its terms, Executive Order No. 12283 required regulations "prohibiting any person subject to U.S. jurisdiction from prosecuting in any court . . . any claim against the Government of Iran arising out of events" relating to, *inter alia*, the seizure of the hostages and their subsequent detention, § 1-101(a); "prohibiting any person not a U.S. national from prosecuting any such claim," § 1-101(b); "ordering the termination of any previously instituted judicial proceedings based upon such claims," § 1-101(c); and "prohibiting the enforcement of any judicial order issued in the course of such proceedings,"

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in 20 *International Legal Materials* 224 (1981). *See also id.* ¶ 11, at 227 (United States agreed to "bar and preclude the prosecution against Iran of any pending or future claim of . . . a United States national arising out of events occurring before the date of the declaration").

[3] Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, Art. II, ¶ 1, *reprinted in* 20 *International Legal Materials* 230-31 (1981).

[4] *Id.*

§ 1-101(d).[5] On February 24, 1981, President Reagan ratified Executive Order No. 12283 and the other orders

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[5] Executive Order No. 12283, 46 Fed. Reg. 7927 (1981), reads in full as follows:

> Non-Prosecution of Claims of Hostages and for Actions at the United States Embassy and Elsewhere
>
> By the authority vested in me as President by the Constitution and statutes of the United States, including Section 203 of the International Emergency Economic Powers Act (50 U.S.C. 1702), Section 301 of Title 3 of the United States Code, Section 1732 of Title 22 of the United States Code, and Section 301 of the National Emergencies Act (50 U.S.C. 1631), in view of the continuing unusual and extraordinary threat to the national security, foreign policy and economy of the United States upon which I based my declarations of national emergency in Executive Order 12170, issued November 14, 1979, and in Executive Order 12211, issued April 17, 1980, in order to implement agreements with the Government of Iran, as reflected in Declarations of the Government of the Democratic and Popular Republic of Algeria dated January 19, 1981, relating to the release of U.S. diplomats and nationals being held as hostages and to the resolution of claims of United States nationals against Iran, and to begin the process of normalization of relations between the United States and Iran, it is hereby ordered that as of the effective date of this Order:
>
> 1-101. The Secretary of the Treasury shall promulgate regulations: [a] prohibiting any person subject to U.S. jurisdiction from prosecuting in any court within the United States or elsewhere any claim against the Government of Iran arising out of events occurring before the date of this Order relating to (1) the seizure of the hostages on November 4, 1979, (2) their subsequent detention, (3) injury to United States property or property of United States nationals within the United States Embassy compound in Tehran after November 3, 1979, or (4) injury to the United States nationals or their property as a result of popular movements in the course of the Islamic Revolution in Iran which were not an act of the Government of Iran; [b] prohibiting any person not a U.S. national from prosecuting any such claim in

signed on January 19. Executive Order No. 12294, 46 Fed. Reg. 14,111-12 (1981). The Secretary of the Treasury issued the implementing regulations on February 26, 1981. 46 Fed. Reg. 14,334 (1981) (to be codified at 31 C.F.R. § 535.216). Though the regulations were required to implement Executive Order No. 12283, we will, for simplicity, speak of the Order as accomplishing results directly.

THIS LITIGATION

Sergeant Persinger and his parents brough suit in the district court against the Islamic Republic of Iran on February 2, 1981, alleging numerous violations of treaties and of international, constitutional, and common law. Counsel for Iran entered an appearance but did not defend. Instead, the United States, to meet its obligations under the executive agreement with Iran, *see American International Group, Inc.* v. *Islamic Republic of Iran*, 657 F.2d 430, 433 (D.C. Cir. 1981), intervened as party-defendant and moved to dismiss the complaint. After a

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any court within the United States; [c] ordering the termination of any previously instituted judicial proceedings based upon such claims; and [d] prohibiting the enforcement of any judicial order issued in the course of such proceedings.

1-102. The Attorney General of the United States is authorized and directed, immediately upon the issuance of regulations in accordance with Section 1-101, to take all appropriate measures to notify all appropriate courts of the existence of this Order and implementing regulations and the resulting termination of litigation.

1-103. The Secretary of the Treasury is delegated and authorized to exercise all functions vested in the President by the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*) to carry out the purpose of this Order.

1-104. This Order shall be effective immediately.

/s/ Jimmy Carter

THE WHITE HOUSE
January 19, 1981

hearing, District Judge Oberdorfer granted the government's motion.[6] J.A. at 102. The district court did not decide whether the simple release of the hostages was a "full satisfaction" of their claims. Relying on *Dames & Moore* v. *Regan*, 453 U.S. 654 (1981), it held instead that "the President may dispose of private claims against foreign states to resolve, or avoid, international crises." J.A. at 104. (In *Dames & Moore*, the Supreme Court upheld the legality of a different executive order issued as part of the effort to carry out the Algerian Declarations.) The district court held, in the alternative, that even in the absence of a valid executive order, Iran enjoys immunity under the Foreign Sovereign Immunities Act (FSIA or Act), 28 U.S.C. §§ 1330, 1603(c), 1605(a)(5) (1976), from suit for torts committed within the confines of the United States Embassy in Tehran. This appeal followed.

Analysis and Decision

Subject Matter Jurisdiction

Neither the appellants nor the United States contend that this court lacks subject matter jurisdiction.[7] If, how-

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[6] Other judges in this circuit had previously dismissed the claims of hostages and their families. Williams v. Iran, Civ. Action No. 79-3295 (D.D.C.), and Lauterbach v. Iran, Civ. Action No. 81-0350 (D.D.C.) (opinion in consolidated cases, June 11, 1981), *appeals pending*, Nos. 81-1672, 81-1676 (D.C. Cir.); Moeller v. Islamic Republic of Iran, Civ. Action No. 80-1171 (D.D.C. Aug. 5, 1981) (no appeal taken). Two other district courts have subsequently dismissed actions brought by former hostages and their families. McKeel v. Islamic Republic of Iran, Civ. Action No. 81-0931, and consolidated case Nos. 81-5108, 81-5109, 81-5274, 81-5482 (C.D.Cal. Nov. 20, 1981) (dismissing for lack of jurisdiction), *appeals pending*, Nos. 82-5111, 82-5114, 82-5115, 82-5116, 82-5117 (9th Cir. Jan. 8, 1982); Roeder v. Islamic Republic of Iran, Civ. Action No. 81-5410 (C.D.Cal. Mar. 8, 1982) (dismissed), *appeal pending*, No. 82-5417 (9th Cir. Apr. 22, 1982).

[7] The United States argued in its motion to dismiss before the district court that the court lacked subject matter juris-

ever, as appellants argue, Executive Order No. 12283 attempts to curb the jurisdiction of the federal courts, and if, contrary to appellants' view, that attempt is lawful, subject matter jurisdiction is indeed lacking. The United States concedes neither that the Executive Order modifies the courts' jurisdiction nor that it is unconstitutional if it does. Instead, the United States proposes that this court not address the jurisdictional issue because, if the President lawfully "settled" the claims of appellants, the litigation must end and, therefore, whether the President withdrew jurisdiction makes no difference in practical terms.

This may be a practical solution, but we think it an impermissible, and surely an undesirable, one. If a court lacks jurisdiction, it has no power to reach the merits.[8] "Subject matter jurisdiction . . . is an Article III as well as a statutory requirement; it functions as a restriction on federal power, and contributes to the characterization of the federal sovereign." *Insurance Corp of*

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diction because Congress did not provide for jurisdiction over Iran in the FSIA. On appeal, the government argues that Iran's immunity under the FSIA warrants dismissal for failure to state a claim on which relief can be granted. Contrary to the government's current position, however, and contrary to one possible reading of a statement in *Dames & Moore*, 453 U.S. at 685 ("No one would suggest that a determination of sovereign immunity divests the Federal courts of 'jurisdiction.' "), the issue of sovereign immunity is jurisdictional in that, even though a court's jurisdiction and a party's immunity are conceptually distinct, the FSIA expressly deprives the federal courts of jurisdiction over any party that is entitled to sovereign immunity. *See* 28 U.S.C. § 1604 (1976); Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300 (2d Cir. 1981); *cf.* Tuck v. Pan American Health Organization, 668 F.2d 547, 549 (D.C. Cir. 1981) (immunity issue must be addressed before merits). We discuss the issue below.

[8] That fundamental precept is embodied in Fed. R. Civ. P. 12(h): "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."

Ireland, Ltd. v. *Campagnie des Bauxites de Guinea*, 102 S. Ct. 2099, 2104 (1982). That characterization includes limits to the powers of federal courts. To exceed those limits is to exercise power illegitimately. For that reason, federal courts ought not to pronounce views on matters without being sure that the issues are rightfully theirs to decide, and this proscription is of special importance when the issues are as serious as those in this case. A court that avoids the jurisdictional question risks unknowingly invading the provinces of other branches of the federal government or those of the states. This difficulty, which implicates fundamental principles of separation of powers and federalism, is not avoided because the pronouncement happens to be correct. A question of the legitimacy of the court's authority remains. There is, as well, another danger inherent in such a practice. There may be a temptation, when the merits clearly favor the party who asserts the absence of jurisdiction and the jurisdictional issue appears complex, to decide the merits in his favor and avoid the question of jurisdiction. The outcome is the same. But when the substantive issues are arguable either way, a court should fear that a desire to avoid the knotty jurisdictional problem may, quite subconsciously, affect its view of the merits. That danger can be averted with certainty only if the issue of jurisdiction is reached and decided first.

To support the proposition that President Carter attempted to curb federal court jurisdiction, appellants cite those portions of the Order which required the Secretary of the Treasury to promulgate regulations "ordering the termination of any previously instituted judicial proceedings" and "prohibiting the enforcement of any judicial order issued in the course of such proceedings." Executive Order No. 12283, § 1-101(c), (d). The regulation issued used similar language. 31 C.F.R. § 535.216(c) states: "No further action, measure or process shall be taken . . . in any judicial proceeding . . . and all such proceedings shall be terminated." Thus, appellants argue

that "the President's order addresses the court and not merely the claim." Brief for Appellants at 14.[9]

Neither party has brough the fact to our attention, but the particular provisions appellants read as an attempt to remove jurisdiction do not apply to their case. Those portions of Executive Order No. 12283, issued January 19, 1981, which order the termination of proceedings and prohibit the enforcement of judicial orders (subsections (c) and (d) of § 1-101) apply only to "previously instituted judicial proceedings." Similarly, the Treasury regulation implementing the Executive Order, 31 C.F.R. § 535.216(c) and (d), though published February 24, 1981, affects only "judicial proceeding[s] instituted be-

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[9] Appellants stress the difference in the terminology employed in Executive Order No. 12294, dealing with commercial claims, which "suspended" all claims that could be presented to an Iran-United States Claims Tribunal for arbitration. Awards of that Tribunal are to be final, but any claim the Tribunal refuses to consider as not within its jurisdiction will revive for disposition in courts. Thus, this court in American International Group, Inc. v. Islamic Republic of Iran, 657 F.2d 430, 441 (D.C. Cir. 1981), construing Executive Order No. 12294, stated:

> We note that the President did not order the litigation suspended, or the power of the courts to consider the claims suspended. Instead, he acted with respect to the claims only. We read this as an effort to modify not the jurisdiction of the courts, but the substantive rule of law they are to apply.

In *Dames & Moore*, the Supreme Court similarly disposed of this jurisdictional argument:

> Executive Order No. 12294 purports only to "suspend" the claims, not divest the federal court of "jurisdiction." As we read the Executive Order, those claims not within the jurisdiction of the Claims Tribunal will "revive" and become judicially enforceable in United States courts. This case, in short, illustrates the difference between modifying federal court jurisdiction and directing the courts to apply a different rule of law.

453 U.S. at 684-85.

fore the effective date of this section," which is January 19, 1981. This suit was filed on February 2, 1981. Thus, the language alleged to raise a jurisdictional issue does not reach this case.

We feel it necessary, nonetheless, to pursue the question of subject matter jurisdiction to make certain that it exists. Although appellants rely for their Article III-based challenge solely on the specific language of subsections (c) and (d) of the relevant sections of the Executive Order and Treasury regulation, they need not have done so. Nothing in what law there is concerning the distinction between an attack on jurisdiction and a change in substantive law makes entirely frivolous an argument that the language of subsections (a) and (b), barring the "prosecuting" of certain claims, constitutes an attempt to restrict subject matter jurisdiction. Indeed, in *Dames & Moore*, even though the challenged Executive Order contained no language addressed to courts rather than to actual or potential litigants, the Supreme Court addressed, and rejected, the argument that the Executive Order attempted to divest federal courts of jurisdiction. 453 U.S. at 684-85. Moreover, it might be argued that, (c) and (d) being invalid attempts to control jurisdiction, (a) and (b) are tainted and fail as well.

If, indeed, the President had attempted to deprive the courts of jurisdiction, a very serious problem would be presented for decision. The Executive Order, so construed, would be addressed to all courts—federal, state, and local. The President would thus be claiming the power, at least in international emergencies, to alter a subject matter jurisdiction for federal courts given by the Constitution and Congress and a jurisdiction for state and local courts given by state legislatures and local assemblies. That would be an awesome power; its very sweep and, to put the matter no higher, its dubious constitutionality are among the factors that lead us to believe the President has not asserted it.

The portions of the Executive Order and Treasury regulation applicable to appellants are addressed to persons, not to courts—one index of a legal change rather than a jurisdiction divestiture. The language mistakenly relied on by appellants is best read as addressed to claimants already in litigation and as describing the effect upon them of the prohibitions on further prosecution. To order the termination of litigation and to prohibit the enforcement of judicial orders may be understood quite naturally, in the context of a single section primarily addressed to persons, as directions to claimants rather than to courts. This is a more natural reading since nothing in the Executive Order or Treasury regulation mentions "jurisdiction." *See Dames & Moore*, 453 U.S. at 684-85. Read in the light of the constitutional difficulties inherent in a jurisdiction restriction, all of the provisions of the Executive Order and Treasury regulation are best understood as defining a rule of law to be applied by courts when faced with certain types of claims. *See American International Group, Inc.* v. *Islamic Republic of Iran*, 657 F.2d at 441.

We do not believe this reading strains the text, and we are reinforced in our belief that this is the interpretation the court must give the language in question by three additional considerations. The first we have already mentioned. It appears highly improbable that the President would have asserted a constitutional power so sweeping and so questionable in a fashion so casual that neither he nor his aides thought it worth defending his possession of that power. Second, the Declarations were drafted not merely in haste but under emergency conditions. The Executive Orders largely tracked the language of the Declarations, probably in order to avoid any charge that the agreement embodied in the Declarations had not been carried out in full. It would be particularly inappropriate to seize upon ambiguities in language drafted under such conditions to provoke a major constitutional dispute. Finally, even if appellants' construction of the text were

more probably the correct one, courts have more than once allowed the pressure of a constitutional issue to influence their interpretation of language. *See NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979); *International Association of Machinists* v. *Street*, 367 U.S. 740, 749 (1961); *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-38 (1961). We hold, therefore, that Executive Order No. 12283 and its implementing regulation contain no attempt to curb the subject matter jurisdiction of any court.

To determine whether the district court had jurisdiction in this case, we must also address the issue of sovereign immunity. *See* note 7 *supra*. Appellants contend that the alleged actions of Iran challenged here come within the exception to sovereign immunity stated in 28 U.S.C. § 1605(a)(5) (1976). Section 1605(a)(5) provides:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—
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> . . . .
>
> (5) . . . in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—
>
> (A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused . . . .

Iran's actions as alleged in the complaint clearly fall within the language of this provision unless they did not occur "in the United States" or unless they were "discre-

tionary." [10] We conclude that, for purposes of the FSIA, the embassy seizure did occur in the United States and was not discretionary; therefore, there is no sovereign immunity bar to jurisdiction.

Section 1603(c) defines "the United States" to "include all territory and waters, continental or insular, subject to the jurisdiction of the United States." Because nothing we have been pointed to in the legislative history of the FSIA offers any aid in defining "territory . . . subject to the jurisdiction of the United States," *see, e.g.*, H.R. Rep. No. 1487, 94th Cong., 2d Sess. 16 (1976); S. Rep. No. 1310, 94th Cong., 2d Sess. 15 (1976), the language itself is our sole guide to decision. That language does not require the territory to be territory of the United States in any absolute sense. In particular, that the embassy in Iran was not United States territory under international law, *see Restatement (Second) of the Foreign Relations Law of the United States* § 77 comment a (1965) (embassies are not territory of sending state); J. Brierly, *The Law of Nations* 260-61 (6th ed. 1963) (same), does not establish the embassy's exclusion from the coverage of § 1603(c). Moreover, the definition of "United States" does not in terms require that the covered territory be exclusively subject to United States jurisdiction. The definition is broad enough to embrace territory under the concurrent jurisdiction of the United States. American embassies abroad meet that criterion, for they are subject to the broad authority of Congress to enact legisla-

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[10] The United States notes, in arguing for a limited interpretation of section 1605(a)(5), that the provision "is directed primarily at the problem of traffic accidents." H.R. Rep. No. 1487, 94th Cong., 2d Sess. 20 (1976). But the language of the section does not admit of a limitation to traffic accidents; indeed, the House Report relied on by the United States expressly points out that the section "is cast in general terms as applying to all tort actions for money damages, not otherwise encompassed by section 1605(a)(2) relating to commercial activities." *Id.* at 20-21.

tion "for the effective regulation of foreign affairs," *Perez* v. *Brownell*, 356 U.S. 44, 57 (1958), and of the State Department to establish rules governing consular affairs, *see*, *e.g.*, 22 U.S.C. §§ 2658, 3926-3927 (1976 & Supp. IV 1980). For example, both United States citizens and foreign nationals are subject to the criminal jurisdiction of the United States for acts committed at American embassies abroad in violation of United States criminal laws. *United States* v. *Erdos*, 474 F.2d 157 (4th Cir. 1973); *United States* v. *Pizzarusso*, 388 F.2d 8 (2d Cir. 1968). In addition, although the specific language of the Federal Tort Claims Act, 28 U.S.C. § 2680(k) (1976) (excluding "any claim arising in a foreign country"), bars tort suits against the United States arising out of events at American embassies abroad, *Meredith* v. *United States*, 330 F.2d 9 (9th Cir. 1964), there is no disputing Congress's power to provide otherwise, and the State Department has statutory authority to "pay tort claims . . . when such claims arise in foreign countries in connection with Department of State operations abroad." 22 U.S.C. § 2669 (f) (1976).

Thus, United States jurisdiction exists in at least two important forms for the protection of persons in American embassies abroad. We have been directed to no example of an interest of such persons for which American jurisdiction provides no protection. Indeed, it is difficult to imagine types of jurisdiction the United States might wish to exercise over its embassies abroad that it has not exercised in some way. The jurisdiction exercised by the United States over its embassies is reinforced by international law's substantial removal of embassies from the jurisdiction of the receiving state. *See*, *e.g.*, Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95; Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820, 596 U.N.T.S. 261. In terms of legal regulation and protection, therefore, the situation of American embassy personnel created by the jurisdiction

of the United States is more like that of Americans at home than that of Americans outside an embassy living in a foreign country. For these reasons, we hold that the United States exercises concurrent jurisdiction over its embassies, so that section 1603(c) of the FSIA includes American embassies abroad.

Section 1605(a)(5) by its terms therefore covers the Iranian actions alleged in appellants' complaint unless those actions were discretionary within the meaning of subsection 1605(a)(5)(A). That subsection, according to the House Report, provides exceptions to jurisdiction that "correspond to many of the claims with respect to which the U.S. Government retains immunity under the Federal Tort Claims Act, 28 U.S.C. § 2680(a)." H.R. Rep. No. 1487, 94th Cong., 2d Sess. 21 (1976). Under that law an act is not discretionary if it is patently illegal or if it is clearly outside the authority of the government or official, so that it is not within the range of discretionary authority within which "there is room for policy judgment and decision," *Dalehite* v. *United States*, 346 U.S. 15, 36 (1953). *See, e.g., Barton* v. *United States*, 609 F.2d 977, 979 (10th Cir. 1979); *Birnbaum* v. *United States*, 588 F.2d 319, 329-30 (2d Cir. 1978); *Griffin* v. *United States*, 500 F.2d 1059, 1068-69 (3d Cir. 1974). An act that is not discretionary in that sense falls outside the range of actions within which decisions should be made without fear of liability, and hence it is not protected by the policy behind the discretionary-function exception to FTCA liability. *See Ferri* v. *Ackerman*, 444 U.S. 193, 203 n.20 (1979). Because the same policy lies behind subsection 1605(a)(5)(A) of the FSIA, and the legislative history directs us to refer to the analogous FTCA provision, we adopt for the FSIA the FTCA's standard for defining "discretionary function." Appellants allege that the seizure and retention of the American embassy in Tehran were, for tort-law purposes, the actions of the government of Iran, and since the complaint was dismissed without the introduction of evidence,

we must suppose that allegation to be true. Applying the FTCA's standard to this assumed fact, it is clear that the alleged Iranian action was nondiscretionary because patently illegal. *See* Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95 (Iran and U.S. parties) (*e.g.*, art. 22: "1. The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission. 2. The receiving state is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion . . . ."); Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820, 596 U.N.T.S. 261 (Iran and U.S. parties) (*e.g.*, arts. 31, 41); Treaty of Amity, Economic Relations and Consular Rights, Aug. 15, 1955, United States-Iran, 8 U.S.T. 901, T.I.A.S. No. 3853 (art. XIII); *Case Concerning United States Diplomatic and Consular Staff in Tehran* (*United States* v. *Iran*), 1980 I.C.J. 200, *reprinted in* 19 *International Legal Materials* 553 (1980) (Iran's actions during seizure and detention of hostages at embassy violate treaties as well as long-established rules of general international law).

We conclude, in sum, that Iran cannot claim immunity in this case and, therefore, that jurisdiction exists to hear this case under the FSIA. The district court properly entertained this case on the merits and so must we. We turn next to the question whether the President has the power to alter the substantive law governing this litigation.

The President's Power to Extinguish Claims

Our analysis of the President's power to extinguish the hostages' legal claims against Iran must be guided by, though it cannot end with, the Supreme Court's opinion in *Dames & Moore*. While there are strong similarities between this case and *Dames & Moore*, there are also important differences. In that case, moreover, the Supreme

Court was careful to warn: "We attempt to lay down no general 'guide-lines' covering other situations not involved here, and attempt to confine the opinion only to the very questions necessary to decision of the case." 453 U.S. at 661. Nonetheless, an attempt to say nothing of general guidance must always be defeated in some measure as soon as reasons are given for the particular decision.

Dames & Moore upheld Executive Order No. 12294, which suspends all commercial claims of United States nationals against Iran while they are presented to international arbitration for final determination. Should the tribunal decide it lacks jurisdiction over any claim, that claim will revive and the claimant will once more be able to assert it in American courts. *See Dames & Moore*, 453 U.S. at 684-85. Unlike Executive Order No. 12283, involved here, 12294 did not terminate the claims.

It is the premise of appellants' argument in this case that the President went to the outer limits of his power in the order upheld in *Dames & Moore* and so must be held to have exceeded his constitutional power here. There is, however, no suggestion in *Dames & Moore* that the President might not have the power asserted in this case. The only guidance the Court provided is a mode of analysis that we must employ.

The issue is the President's power to direct the courts to apply one rule of law rather than another to a particular class of claims. There can be little doubt that the President's action would be lawful if taken pursuant to congressional authorization. *See, e.g., United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936). But here there is no authorizing or ratifying legislation by Congress. At the other extreme, it is as certain as anything can be that the President could not make substantive law in direct opposition to legislation by Congress. This is the lesson of *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952). In rejecting President

Truman's claim of constitutional power to seize the nation's steel mills to avert a strike and keep the mills running during the Korean conflict, Justice Black's opinion for the Court placed emphasis on the fact that Congress had expressly refused to give the President the power exercised and had provided other mechanisms for dealing with such labor disputes. 343 U.S. at 586.[11]

This case differs from *Youngstown* because there is here no congressional disapproval, express or tacit, of what was done. Neither, as we have noted, is there prior explicit congressional authorization or explicit subsequent ratification. *Youngstown* does not require, however, that there always be formal congressional assent. Tacit approval may often suffice. This case, like *Dames & Moore*, thus concerns that little-explored mid-range of presidential power, that "zone of twilight in which [the President] and Congress may have concurrent authority, or in which its distribution is uncertain." *Dames & Moore*, 453 U.S. at 668 (quoting *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)).

In that zone, "the validity of the President's action, at least so far as separation-of-powers principles are concerned, hinges on a consideration of all the circumstances which might shed light on the views of the Legislative Branch toward such action, including 'congressional inertia, indifference or quiescence.'" *Dames & Moore*, 453

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[11] These factors were stressed in the concurring opinions of Justices Frankfurter, *id.* at 597-609, Jackson, *id.* at 637-39, Burton, *id.* at 656-60, and Clark, *id.* at 662-66. Even Chief Justice Vinson's opinion for the three dissenters thought it important to stress that the President had not acted in defiance of a law of Congress. *Id.* at 701-03. Justice Frankfurter put the matter flatly: "It cannot be contended that the President would have had power to issue this order had Congress explicitly negated such authority in formal legislation." *Id.* at 602. Indeed, President Truman also agreed that Congress could override his action. *Id.* at 677.

U.S. at 668-69 (quoting in part from *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring)). Here, as in *Dames & Moore*, congressional views are discernible primarily by reference to the principle formulated by Justice Frankfurter in *Youngstown*: "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on 'executive power' vested in the President by § 1 of Art. II." 343 U.S. at 610-11.[12] The difficulty of applying this principle to the almost unimaginable variety of situations that may arise makes it important to stress that today's decision does not purport to suggest how this principle may apply to circumstances other than those involved here. As Justice Jackson wrote in *Youngstown*, "[i]n this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law." 343 U.S. at 637 (footnote omitted). The present case involves a unique emergency in the foreign affairs of the United States, one in which the President sought to end the captivity of American citizens as well as possible danger to their lives.

The crucial question in *Dames & Moore* was whether Congress had acquiesced in the presidential power asserted. For purposes of this case, we need only summarize the evidence that convinced the Supreme Court that Congress had acquiesced in the type of presidential action involved there. The Court held that no statute authorized the President's action but said: "[W]e cannot ignore the general tenor of Congress' legislation in this area in trying to determine whether the President is acting alone or

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[12] Congress has questioned particular exercises of the presidential power at issue here, *see* note 16 *infra*, but never, to our knowledge, the power itself.

at least with the acceptance of Congress." 453 U.S. at 678. Thus, the International Emergency Economic Powers Act, Pub. L. No. 95-223, 91 Stat. 1626, 50 U.S.C. §§ 1701-1706 (Supp. III 1979) ("IEEPA"), and the "Hostage Act," 22 U.S.C. § 1732 (1976),[13] while they did not authorize the President's suspension of the claims, were deemed "highly relevant in the looser sense of indicating congressional acceptance of a broad scope for executive action in circumstances such as those presented in this case." 453 U.S. at 677.[14] Those circumstances—the inter-

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[13] Section 203 of the IEEPA, 50 U.S.C. § 1702 (Supp. III 1979), provides in part that

> the President may . . . nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest . . . by any person, or with respect to any property, subject to the jurisdiction of the United States.

In rejecting this provision as direct authority for the President's power to suspend claims, the Court concluded that "[t]he claims of American citizens against Iran are not in themselves transactions involving Iranian property or efforts to exercise any rights with respect to such property." 453 U.S. at 675.

The Hostage Act directs the President to "use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release" of any United States citizen "unjustly deprived of his liberty by or under the authority of any foreign government." The legislative history of this statute, according to the Supreme Court, belied the argument that it was designed to cover a situation like the Iranian hostage crisis. 453 U.S. at 676-77.

[14] Since Congress cannot anticipate every possible action a President may need to take in all possible situations, failure to have delegated a particular authority, especially in the field of foreign policy and national security, does not imply disapproval of action. 453 U.S. at 678 (citing Haig v. Agee, 453 U.S. 280, 291 (1981)).

national crisis—are, of course, identical in this case. The Court stated:

> [T]he enactment of legislation closely related to the question of the President's authority in a particular case which evinces legislative intent to accord the President broad discretion may be considered to "invite" measures on independent presidential responsibility." *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring). At least this is so where there is no contrary indication of legislative intent and when, as here, there is a history of congressional acquiesence in conduct of the sort engaged in by the President.

Id. at 678-79.

The Court reviewed the history of congressional acquiesence. It is summarized in two statements in the Court's opinion. The first is: "Crucial to our decision today is the conclusion that Congress has implicitly approved the practice of claim settlement by executive agreement." 453 U.S. at 680. However, the practice the Court was describing differs from the practice involved in this case: "[T]he President has agreed to renounce or extinguish claims of United States nationals against foreign governments in return for lump sum payments or the establishment of arbitration procedures." 453 U.S. at 679. With respect to the hostages, no lump sum was paid for their claims and no tribunal was created or specified to try those claims. The President, pursuant to his agreement with Iran, totally extinguished the hostages' claims in return for the hostages' release. The government has been unable to point to any previous episode in which the President, without specific authorization or ratification by Congress, wholly extinguished the claims of American nationals. That is not surprising, perhaps, since no President had ever faced a situation quite like this.

The United States contends that there was a "settlement" here and that this case is therefore governed by *Dames & Moore*; that is, that this arrangement is of the

type in which Congress has acquiesced over the years. Appellants just as earnestly deny that their claims were "settled" since they received nothing other than the cessation of illegal behavior.

There is little to be gained from an inquiry into the various meanings and nuances of the word "settlement." We have been warned on good authority that "it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary." *Cabell* v. *Markham*, 148 F.2d 737, 739 (2d Cir.) (L. Hand, J.), *aff'd*, 326 U.S. 404 (1945). With respect to issues of this gravity, semantic arguments weigh little against considerations of constitutional structure and function and considerations of the necessity of the case.

What it is that Congress has approved over the years can be stated at different levels of generality. It is possible to say that Congress has acquiesced only in the long-standing presidential practice of disposing of the claims of Americans against foreign governments when a sum of money was obtained in return or an alternative tribunal provided. It is also possible to say that Congress has acquiesced in presidential authority to dispose of claims when important foreign policy considerations were at stake. The force of the first, more limited formulation is considerably diminished when it is recognized that Congress has never been presented with a situation in which claims were wholly extinquished, largely because no President ever faced a situation quite like the Iranian hostage crisis.

We think the evidence of congressional approval of presidential actions recited in *Dames & Moore* applies to the agreement made by President Carter. Strong presidential authority in the field of claim disposal, when necessary to the imperative interests of the Nation, is, we believe, what Congress has approved. We note that the *Restatement (Second) of the Foreign Relations Law of the United States* § 213 comment a (1965) apparently

comes to the same conclusion: "Under the rule of international law . . . it is clear that the government of the United States can, without consent of the injured party, effect a *waiver* or settlement that relieves the foreign state of further responsibility. It is equally clear that such consent is not required by the law of the United States." (Emphasis added.)[15]

Congress's reaction to the President's handling of this specific set of events does more than shed direct "light on the views of the Legislative Branch toward" the specific action challenged here. *Dames & Moore*, 453 U.S. at 668. Congress's acquiescence here also supports our understanding of the scope of the presidential authority that Congress has accepted over the years. Both the agreement with Iran and Executive Order No. 12283 are now over one and one-half years old, as is President Reagan's ratification of that Order. Congress has in no way manifested any disapproval of what was done to secure the release of the hostages. Congress has enacted no legislation reinstating hostage claims. It has enacted no legislation forbidding such action by a President in the future. In fact, so far as we have discovered, no bill of such tenor has even been introduced. To the contrary, the only bills relating to the subject that have been introduced would, if enacted, provide for compensation to the former hostages. Thus, Congress can realistically be said to have approved this specific action,[16] and this congressional ap-

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[15] In *Dames & Moore*, the Court quoted with approval the heading of § 213: "(President 'may waive or settle a claim against a foreign state . . . [even] without the consent of the [injured] national')." 453 U.S. at 680.

[16] The Supreme Court stated in *Dames & Moore*, 453 U.S. at 688 n.13:

> Contrast congressional reaction to the Iranian Agreements with congressional reaction to a 1973 Executive Agreement with Czechoslovakia. There the President sought to settle over $105 million in claims against Czechoslovakia for $20.5 million. Congress quickly demonstrated

proval is strong evidence of the level of generality to be attributed to congressional acquiescence through our history: the President need not obtain a sum of money or an alternative tribunal but may extinguish claims altogether when "the imperatives of events" make that necessary to resolve an international crisis.

This reading of congressional approval and presidential authority is supported by the necessities of government. The first rule of construing the Constitution is that the resulting allocation of powers must be adequate to the problems the country must face. "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government." *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring). No doubt congressional approval of the action taken here reflects an appreciation of that principle. If Congress reinstated the hostage claims or disapproved such presidential action for the future, a President of the United States might be rendered helpless to rescue United States citizens and resolve a dangerous international crisis should such an event as the hostage detention ever recur. A ruling by a federal court that the hostages' claims survived Executive Order 12283, if allowed to stand, would have the same crippling effect upon the President in the future.

General approval by Congress of this type of presidential action is often the most that can be expected before specific executive agreements are made. In circumstances like the Iranian hostage detention, it will often be utterly impracticable for a President to negotiate with Congress and the foreign government simultaneously in

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its displeasure by enacting legislation requiring that the Agreement be renegotiated. [*See* Lillich, *The Gravel Amendment to the Trade Reform Act of 1974*, 69 Am. J. Int'l L. 837, 839-40 (1975).]. Though Congress has shown itself capable of objecting to executive agreements, it has rarely done so and has not done so in this case.

order to get legislation authorizing the precise agreement that must be made. Legislative bodies are designed for deliberation, not for instantaneous responses to shifting negotiating positions. In addition, the progress of negotiations such as these must often be secret. Revelation of positions taken and compromises proposed would often destroy any prospect of ultimate success. We find nothing in the Constitution that mandates any such stultifying and possibly disastrous result.[17]

We think this result is confirmed by a parallel line of reasoning. If federal court approval of foreign policy actions of this type depended upon whether there had been a "settlement" in the form of a lump sum payment or the provision of an arbitral tribunal, then the courts would have to determine whether the payment or the tribunal was adequate. Otherwise, the settlement requirement would become practically meaningless to the persons whose claims were abated. Yet judicial review of the adequacy of a presidential settlement would mean that the foreign nation involved would not know whether it had a valid agreement with the United States until perhaps years of litigation had been concluded. Few agreements would be made under such a requirement, and, in particular, it seems clear that President Carter's agreement with Iran would not have been possible.

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[17] We reiterate, lest we be misunderstood, that we are speaking only of presidential action within a range where Congress may realistically be said to have given its approval. Nothing said here is intended to suggest a presidential power to negotiate secretly and to extinguish claims in opposition to the will of Congress. Convenience and efficiency are not the sole constitutional values in play even in foreign affairs, and we remain mindful of the admonition that "[t]he doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy." Myers v. United States, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).

Perhaps for this reason counsel for appellants conceded at oral argument that even an inadequate settlement (the example used was $5,000 per hostage for fifteen months of imprisonment and physical abuse) would extinguish their claims against Iran and that any remaining amount of the claim would have to be asserted as a claim against the United States for the taking of private property. We agree that counsel's concession was a proper one, both because of the stated effect upon foreign policy and because of the proximity of the political question doctrine should courts undertake such a reviewing function.[18] But this conclusion means that the asserted settlement requirement is wholly artificial. If the President could secure the hostages' freedom and safety in return for extinguishing their claims for damages, and if the amount of any "settlement" is not judicially reviewable, what point can there be in insisting that he must receive as well $5,000 per hostage, or $5, or merely the traditional peppercorn? That would make constitutional authority turn on utter trivialities. To impose so en-

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[18] Baker v. Carr, 369 U.S. 186, 217 (1962), gives the standard formulation of the political question doctrine:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Most, if not all, of these characteristics of a political question would evidently be present in any judicial effort to review the adequacy of a claims settlement agreed to by the President in resolving an international crisis like the one giving rise to this case.

tirely symbolic a requirement would not be merely pointless; it could be dangerous. There will be regimes—the President may reasonably have believed he was dealing with one here—that will not pay even a token sum because to do so would be to confess wrongdoing before the world. In those circumstances, to demand that the President get a few dollars in addition to the freedom and safety of the hostages would be to ensure that he get neither and that the hostages remain indefinitely in captivity and peril.

We conclude that Executive Order No. 12283 and the regulations issued under it extinguished appellants' claims against Iran. The district court correctly dismissed their complaint because it failed to state a claim upon which relief can be granted.

Appellants' Taking Claim

The Persingers argue finally that the President acted unlawfully in extinguishing their claims because doing so effected a taking of private property for public use for which the Fifth Amendment mandates that just compensation be paid.[19] The suggestion, apparently, is that the remedy for a taking for which compensation has not been paid is to invalidate the executive order. We need not address that proposition in its full generality because, if there has been an unconstitutional taking, a point we do not decide, the Fifth Amendment affords no basis for invalidating the challenged action in this case.

Executive Order No. 12283 is immune from invalidation under the takings clause because, as in *Dames & Moore*, there was at the time of the alleged taking a "reasonable, certain and adequate provision for obtaining compensation." *Cherokee Nation* v. *Southern Kansas R.R.*, 135 U.S. 641, 659 (1890); *see Regional Rail Reorganiza-*

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[19] The Fifth Amendment provides in part: "[N]or shall private property be taken for public use without just compensation." U.S. Const. amend. V.

tion Act Cases, 419 U.S. 102 (1974); *Hurley* v. *Kincaid*, 285 U.S. 95 (1932); *Stringer* v. *United States*, 471 F.2d 381, 383 (5th Cir.), *cert. denied*, 412 U.S. 943 (1973). Appellants argue that no provision for compensation to the hostages has been forthcoming from Congress or the President. But the availability of the Tucker Act, which gives the Court of Claims jurisdiction to award damages for takings-clause violations, 28 U.S.C. § 1491 (1976), satisfies the constitutional requirement of an adequate provision for compensation.[20] *See Regional Rail Reorganization Act Cases*, 419 U.S. at 122-36; *Hurley* v. *Kincaid*, 285 U.S. at 104-05; *Stringer* v. *United States*, 471 F.2d at 383. In *Dames & Moore*, the Supreme Court stated:

> [T]o the extent petitioner believes it has suffered an unconstitutional taking by the suspension of the claims, we see no jurisdictional obstacle to an appropriate action in the United States Court of Claims under the Tucker Act.

453 U.S. at 689-90.[21] That reasoning controls this case: appellants are free to pursue their taking claim against the United States in the Court of Claims under 28 U.S.C. § 1491 (1976); they may not pursue it in the district courts because they claim more than $10,000. 28 U.S.C. § 1346(a) (1976). We repeat that we express no views on whether a taking has occurred.

Affirmed.

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[20] We indicate no view on the legal consequences of a taking where there is no adequate provision for compensation. *See* Hurley v. Kincaid, 285 U.S. 95, 104 & n.3 (1932).

[21] The Court noted that the "treaty exception" to the jurisdiction of the Court of Claims, 28 U.S.C. § 1502 (1976), would not preclude an action under § 1491 in the Court of Claims, 453 U.S. at 689, apparently because that exception covers only taking claims derived from the treaty (or executive agreement), not those derived from the Constitution. *See* United States v. Weld, 127 U.S. 51, 57 (1888); Note, *The Iranian Hostage Agreement Under International and United States Law*, 81 Colum. L. Rev. 822, 874-75 (1981).

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GREGORY ALLEN PERSINGER, et al.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 81-0230
ISLAMIC REPUBLIC OF IRAN, et al.,	)	FILED AUG. 21, 1981 JAMES F. DAVEY, Clerk
Defendants.	)	

MEMORANDUM

Plaintiffs sue the Islamic Republic of Iran for damages on account of the retention of Gregory Persinger as a hostage from November 4, 1979 until January 20, 1981. The United States has intervened and moved to dismiss. It invokes its January 19, 1981 agreement with Iran, pursuant to which Iran agreed to release the hostages, including Persinger, provided, inter alia, the United States would bar prosecution in courts of the United States of claims against Iran on account of the hostages' detention. See Declaration of the Government of the

Democratic and Popular Republic of Algeria (Jan. 19, 1981). The United States' memorandum in support of its motion also points to Executive Orders issued by the Presidents Carter and Reagan appointing a commission to investigate alternate means by which the United States itself might compensate hostages and their families for the grievous injury which they have suffered in the service of the Nation. Exec. Order 12285, 46 Fed. Reg. 7931 (1981); Exec. Order 12307 (June 4, 1981).

Plaintiffs' claim here is not materially different from three other claims which two other judges of this Court have already dismissed and which are now pending in the Court of Appeals. Williams v. Iran, C.A. No. 79-3295 (D.D.C.) and Lauterbach v. Iran, C.A. No. 81-0350 (D.D.C.) (opinion in consolidated cases, June 11, 1981), appeals pending, Nos. 81-1672 and 81-1676 (D.C. Cir.); Moeller v. Islamic Republic of Iran, C.A. No. 80-1171 (D.D.C. August 5, 1981). Without

reaching the question of whether this Court can take cognizance of defendant's contention that release of the hostages under terms of the January 19, 1981 Declaration was a full satisfaction of the hostages' claims against Iran, the Court relies on the well-settled authority that the President may dispose of private claims against foreign states to resolve, or avoid, international crises. Dames & Moore v. Regan, ___ U.S. ___, 49 U.S.L.W. 4969, 4974-76 (U.S., June 30, 1981); see also United States v. Pink, 315 U.S. 203, 231 (1942); United States v. The Schooner Peggy, 5 U.S. (1 Cranch) 103, 109-110 (1801). Moreover, plaintiffs in this case, like plaintiffs in Williams, Lauterbach and Moeller, have failed to establish that the tortious acts committed within the Embassy in Tehran are actionable in this Court under the Foreign Sovereign Immunities Act. See 28 U.S.C. § 1605 (a)(5). The prior decisions in this District establish that the United States

Embassy in Tehran is not United States territory within the meaning of Section 1605 (a)(5) and that the State of Iran enjoys immunity from suit in federal courts here for the torts committed in the seizure of the Embassy and the detention of the persons found there. The President's Commission on Hostage Compensation created by the Executive Orders may design appropriate relief for the plaintiffs.

/S/Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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ISLAMIC REPUBLIC OF IRAN, et al.,	)	FILED AUG. 21, 1981 JAMES F. DAVEY, Clerk
Defendants.	)	

ORDER

The matter is before the Court on defendant United States' motion to dismiss. Upon consideration of defendant's motion, plaintiffs' response thereto, and the entire record, it is this 21st day of August 1981 hereby

ORDERED: That the United States' motion to dismiss should be, and is hereby, granted.

/S/Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

APPENDIX D

AFFIDAVIT OF MICHAEL D. SANDLER

1. My name is Michael D. Sandler. I am a partner of the law firm of Steptoe & Johnson in Washington, D.C.

2. From April 1975 through October, 1977, I served as Special Assistant to the Legal Adviser of the United States Department of State. In that capacity, I was assigned specific responsibility for managing within the Department of State the preparation of proposed legislation submitted by the Administration to the Congress in 1975 ("the 1975 Bill") that was ultimately enacted by the Ninety-Fourth Congress as the Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583. A Mr. Bruno Ristau had similar responsibility within the Department of Justice.

3. The 1975 Bill was a revised version of proposed legislation initially submitted by the Administration to the Ninety-Third Congress in 1973 ("the 1973

Bill") together with a section-by-section analysis of the proposed legislation. The 1973 Bill was ultimately introduced in the House of Representatives as H.R. 3493 and in the Senate as S. 566.

4. To accommodate a variety of concerns about the 1973 Bill voiced by witnesses in testimony before Congress, and by others, the Administration undertook to revise the 1973 Bill for ultimate submission to the Congress in 1975. Any substantive changes made in the 1973 Bill were each considered very carefully by the Administration, and especially by the lawyers within the Departments of State and Justice and were discussed extensively with bar groups, and other government agencies and interested persons.

5. After a final text for the 1975 Bill had been thus established, lawyers within the Departments of State and Justice undertook a revision of the 1973 section-by-section analysis for

submission with the 1975 Bill. These revisions to the section-by-section analysis were made during the final steps of preparing the proposed legislation for submission to the Congress. It was the intention of those preparing the revised section-by-section analysis faithfully to reflect any substantive changes adopted in the 1975 Bill, but it is entirely possible that an inadvertent mistake occurred. Ultimately, the revised section-by-section analysis was adopted by the Congressional Committees considering the 1975 Bill and incorporated in their Committee report.

6. With respect to differences in language on whether torts of a foreign state must have occurred within the United States to be actionable -- which language appears in Section 1605(5) in the 1973 Bill and 1605(a)(5) in the 1975 Bill -- I have no recollections of any nature as to any such differences between the 1973 Bill and the 1975 Bill or between the 1975 Bill

and the section-by-section analysis to the 1975 Bill.

/s/ Michael D. Sandler
MICHAEL D. SANDLER

Sworn to and subscribed
Before me this 6th day of
July, 1984

/s/ Eleanor L. Hall
Notary Public

No. 84-47

In the Supreme Court of the United States

OCTOBER TERM, 1984

GREGORY ALLEN PERSINGER, LAWRENCE PERSINGER AND JACQUELINE PERSINGER, PETITIONERS

v.

ISLAMIC REPUBLIC OF IRAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Islamic Republic of Iran is subject to the jurisdiction of United States courts pursuant to the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1330(a), for torts it committed at the United States Embassy in Tehran.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals on rehearing (Pet. App. 1a-18a) is reported at 729 F.2d 835. The court of appeals' original opinion (Pet. App. 21a-49a), vacated on rehearing, was reported at 690 F.2d 1010 but was withdrawn by the court. The opinion and order of the district court (Pet. App. 53a-57a) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a) was entered on March 13, 1984. On May 23, 1984, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including July 11, 1984, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners are Gregory Allen Persinger, who was seized as a hostage by Iranian militants during the takeover of the United States Embassy in Tehran on November 4, 1979, and his parents. Petitioners commenced this action in the United States District Court for the District of Columbia, seeking redress from Iran for damages stemming from Persinger's captivity at the embassy. Persinger sued for injuries sustained while he was in captivity, and his parents alleged that their son's detention caused them grave emotional distress. Jurisdiction over Iran was predicated on the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1330(a). The United States intervened as a defendant and moved to dismiss the suit on the ground that the international executive agreement between Iran and the United States (see generally *Dames & Moore* v. *Regan*, 453 U.S. 654 (1981)) barred former hostages and their families from suing Iran.

2. The district court dismissed the action (Pet. App. 53a-56a). Relying on the President's long-recognized authority to dispose of private claims against foreign states, the court upheld the international executive agreement settling petitioners' claims against Iran in exchange for the release of the hostages (*id.* at 55a). In addition, the court concluded that the United States Embassy in Tehran did not constitute United States territory for purposes of the FSIA and that Iran therefore enjoyed immunity from suit for torts committed at the embassy (*id.* at 55a-56a).[1]

3. In its initial opinion (Pet. App. 21a-49a), the court of appeals rejected Iran's claim of sovereign immunity, but it nevertheless affirmed the dismissal of the action. Relying

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[1]In dismissing the action, the district court did not distinguish between Persinger's claims and those of his parents.

largely on this Court's decision in *Dames & Moore* v. *Regan, supra*, the court held that the international executive agreement lawfully barred the hostages from suing Iran (Pet. App. 37a-48a).[2]

Despite the favorable judgment dismissing petitioners' claims, the United States petitioned for rehearing on the issue of sovereign immunity. The court granted the government's petition and vacated its prior opinion (Pet. App. 1a-16a). In reexamining the pertinent provisions of the FSIA, the court concluded that it had erred in holding that the statutory definition of "United States" encompassed all territory over which the United States exercises any form of jurisdiction; instead, the court reasoned that the statute encompasses only territory over which the United States exercises territorial sovereignty (*id.* at 8a). The court confirmed its reading of the statute through reliance on the legislative history, which revealed both an overriding congressional intent to conform our law to that of most other nations and a special focus on the problems created by torts, especially traffic accidents, committed by foreign nations in this country (*id.* at 8a-10a).

With respect to the claims of Persinger's parents, the court, with one dissent, neld that the FSIA had not abrogated Iran's immunity for the alleged tort of infliction of

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[2]The court of appeals initially held that Iran was not entitled to sovereign immunity for tortious acts that took place on embassy grounds (Pet. App. 33a-37a). The court relied on the FSIA's definition of "United States," which "includes all territory and waters, continental or insular, subject to the jurisdiction of the United States" (28 U.S.C. 1603(c)). In essence, the court held that this language was broad enough to include all territory over which the United States exercises *any* form of jurisdiction (Pet. App. 34a-36a). Inasmuch as the United States clearly exercises some jurisdiction over its embassies, the court concluded that torts arising out of the Iranian takeover of our embassy occurred within the "United States" for purposes of the FSIA (*ibid.*).

emotional distress even though the parents' injuries unquestionably occurred "in the United States." The court reasoned that it would be anomalous indeed to bar a former hostage's claim for damages while at the same time recognizing the derivative claims of family members (Pet. App. 14a-15a). The court also relied (*id.* at 15a) on the House Report on the FSIA, which stated that "the tortious act or omission must occur within the jurisdiction of the United States." H.R. Rep. 94-1487, 94th Cong., 2d Sess. 21 (1976).

Because its decision on rehearing rested on jurisdictional grounds, the court of appeals found it unnecessary and inappropriate to proceed further, and it accordingly vacated its initial opinion upholding the validity of the international executive agreement (Pet. App. 5a, 16a).

ARGUMENT

The court of appeals' decision that Iran is entitled to sovereign immunity for torts it committed at the United States Embassy in Tehran is correct and warrants no further review by this Court. There is no conflict in the circuits; indeed, the decision below is consistent with the result reached by the only other court of appeals that has addressed the issue. See *McKeel* v. *Islamic Republic of Iran*, 722 F.2d 582 (9th Cir. 1983), cert. pending, No. 83-1890. The decisions of both courts of appeals that American embassies abroad are not part of the "territory and waters, continental or insular, subject to the jurisdiction of the United States" (28 U.S.C. 1603(c)) is mandated by the language of the FSIA, its legislative history, and accepted principles of international law that the FSIA was intended to codify.[3]

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[3]In all events, petitioners' tort claims against Iran are barred by the international executive agreement between Iran and the United States settling those claims in exchange for the release of the hostages. This Court has previously sustained the President's authority to settle claims

1. The subject matter and personal jurisdiction of federal courts over foreign states is derived from the FSIA. In accordance with traditional principles of international law, that Act provides that "[s]ubject to existing international agreements * * * a foreign state shall be immune from the jurisdiction of the courts of the United States." 28 U.S.C. 1604. Section 1605 of the Act sets forth certain exceptions to the general rule of immunity; Section 1605(a)(5) contains one such exception upon which petitioners here rely (emphasis added):

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States * * * in any case—
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> * * * * *
>
> (5) * * * in which money damages are sought against a foreign state *for personal injury or death, or damage to or loss of property, occurring in the United States* and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment * * *.

The "United States" is defined in the FSIA to include "all territory and waters, continental or insular, subject to the jurisdiction of the United States." 28 U.S.C. 1603(c). Thus, if the foreign state's tortious acts or omissions occur "in the United States," the immunity of the foreign state is abrogated (with some exceptions not pertinent here), and there is both subject matter and personal jurisdiction in United

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of United States nationals against Iran in the circumstances of the Iranian hostage crisis. *Dames & Moore* v. *Regan, supra.* Although the court of appeals vacated its initial opinion applying *Dames & Moore* to petitioners' claims, the reasoning employed by the court seems clearly correct and further undermines the need for this Court to consider the threshold jurisdictional issue.

States courts. 28 U.S.C. 1330(a) and (b). The narrow question presented here is whether American embassies abroad are "in the United States" for purposes of the FSIA.

a. The court of appeals' decision is consistent with the most natural reading of the statutory language. To be sure, petitioners' contention (Pet. 9-15) that territory over which the United States exercises any form of jurisdiction constitutes the "United States" for purposes of the FSIA is linguistically possible. In other words, since the United States has jurisdiction to prescribe rules governing certain activities or conduct at American embassies abroad, that power renders embassies, in the most technical sense, "territory * * * subject to the jurisdiction of the United States." 28 U.S.C. 1603(c). As the court below and the Ninth Circuit in *McKeel* both concluded, however, the statutory language admits of a more logical construction — the FSIA abrogates a foreign state's immunity only for tortious acts occurring within the sovereign territorial jurisdiction of the United States.

The statutory provision abrogating a foreign state's immunity from tort liability requires that the tortious injury occur "in the United States." 28 U.S.C. 1605(a)(5). If the FSIA contained no definition of the "United States," that phrase could not conceivably be thought to include our embassies abroad. Put simply, United States embassies are in foreign countries; they are not United States territory. Restatement (Second) of the Foreign Relations Law of the United States § 77 comment a (1965); J. Brierly, *The Law of Nations* 260-261 (6th ed. 1963).

The FSIA's definition of the "United States" (28 U.S.C. 1603(c)) does not require that the foregoing intuitive result be abandoned. The statute's inclusion of that definition is easily explained by the need to make clear whether "United States" was to encompass only the 50 states and the District

of Columbia, or also included various United States territories, commonwealths, possessions, and waters under American sovereignty. The phrase "territory and waters, continental or insular, subject to the jurisdiction of the United States," is a legal term of art used by Congress *not* to refer to our embassies, but to refer both to the 50 states and all other areas over which the United States, and no other nation, exercises sovereign territorial jurisdiction.[4] Indeed, this Court has held that "the United States and all territory subject to the jurisdiction thereof" means "the regional areas — of land and adjacent waters — over which the United States claims and exercises dominion and control as a sovereign power." *Cunard S.S. Co.* v. *Mellon*, 262 U.S. 100, 122 (1923). Embassies, by contrast, are subject to the territorial jurisdiction of the host state; although they may be accorded certain immunities by treaty or customary international law, they are not part of the sending state's sovereign domain.[5]

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[4]Virtually identical definitions of "United States" are included in a host of other statutes as a legal term of art to define the geographic applicability of the statutes' substantive provisions. See, *e.g.*, 8 U.S.C. 1185; 18 U.S.C. 5; 21 U.S.C. 802; 22 U.S.C. 401, 408a, 450, 451, 462, 465; 50 U.S.C. 82, 191. Some of these statutes (18 U.S.C. 5; 21 U.S.C. 802) state expressly that the definition of "United States" is used in the territorial sense, while others not only employ the definition in that sense but also involve subjects that could not possibly encompass American embassies. See 8 U.S.C. 1185 (entry to and departure from the United States by aliens and citizens); 22 U.S.C. 401, 408a (export of war material from the United States); 22 U.S.C. 450, 451, 462, 465, 408a (authority to detain or force vessels to leave the United States and to grant or restrict access to American ports); 47 U.S.C. 34-39 (regulation of submarine cables); 50 U.S.C. 82 (procurement of ships by government during war).

[5]See, *e.g.*, *Meredith* v. *United States*, 330 F.2d 9, 10-11 (9th Cir.), cert. denied, 379 U.S. 867 (1964); *Fatemi* v. *United States*, 192 A.2d 525, 527 (D.C. 1963) (embassy not the territory of sending state); Restatement (Second) of the Foreign Relations Law of the United States § 77 comment a (1965).

Petitioners' argument depends on the fact that persons or activities at our embassies are subject to some form of jurisdiction by the United States. See, *e.g., United States* v. *Erdos*, 474 F.2d 157 (4th Cir.), cert. denied, 414 U.S. 876 (1973); *United States* v. *Pizzarusso*, 388 F.2d 8 (2d Cir.), cert. denied, 392 U.S. 936 (1968). Petitioners' reliance on *Erdos* and *Pizzarusso* is misplaced. Both were criminal cases, involving the United States' assertion of jurisdiction over individual defendants. We are unaware of any case involving the exercise of jurisdiction by a United States court over a *foreign state* for conduct or activity occurring within the territorial jurisdiction of that foreign state. Accordingly, the phrase "in the United States" as used in Section 1605(a)(5) should be given its natural reading, and not the strained construction urged by petitioners.

b. A review of the legislative purpose and history of the FSIA confirms that Congress never intended to assert jurisdiction over foreign states for acts occurring wholly within their own territory.[6] One of Congress's principal purposes in enacting the FSIA was to make United States law on sovereign immunity consistent with international law. See H.R. Rep. 94-1487, 94th Cong., 2d Sess. 7 (1976); S. Rep. 94-1310, 94th Cong., 2d Sess. 20 (1976); *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 94th Cong., 2d Sess. 29 (1976) (remarks of Bruno Ristau); *id.* at 33 (remarks of Monroe Leigh) [hereinafter cited as *1976 Hearings*]. Codifications by other states and international organizations have provided that a state

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[6]Indeed, the general rule is that " 'legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States . . . .' " *United States* v. *Spelar*, 338 U.S. 217, 222 (1949) (quoting *Foley Bros.* v. *Filardo*, 336 U.S. 281, 285 (1949)).

loses its sovereign immunity for tortious acts only when such acts occur in the territory of the forum state. See, *e.g.*, European Convention on State Immunity and Additional Protocol, Art. 11, Council of Europe, No. 74 (1972), *reprinted in* United Nations Legislative Series, *Materials on Jurisdictional Immunities of States and Their Property*, U.N. Doc. ST/LEG/SER.B/20, at 159 (1982) [hereinafter cited as *U.N. Legis. Ser.*] ("A Contracting State cannot claim immunity * * * [in a tort case] if the facts which occasioned the injury or damage occurred in the territory of the State of the forum * * *."); [7] State Immunity Act 1978, ch. 33, § 5 (U.K.), *U.N. Legis. Ser.* 43; Foreign Sovereign Immunity Act of 1981, § 6 (South Africa), *U.N. Legis. Ser.* 36-37; State Immunity Act 1979, Pt. II, § 7 (Singapore), *U.N. Legis. Ser.* 30. Indeed, we are not aware of any instance in which the courts of one state have exercised jurisdiction over the tortious conduct of another foreign state within its own territory.[8]

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[7] In testifying in support of the FSIA, the State Department's Legal Adviser noted that the FSIA was basically consistent with the European Convention. *1976 Hearings* 37.

[8] Not only did Congress wish to conform our practice to that of other nations, but in so doing it was careful to ensure that the minimum contacts necessary to satisfy due process would be present in any action against a foreign state. In Section 1330(b) of the FSIA, Congress intended to provide a "Federal long-arm statute over foreign states" that would satisfy due process requirements by having the "immunity provisions * * * [Sections 1605-1607] prescribe the necessary contacts which must exist before our courts can exercise personal jurisdiction." H.R. Rep. 94-1487, *supra*, at 13. But if the tortious conduct is carried out totally within another nation's territory, it is doubtful that the necessary minimum contacts will be present —the foreign state may not have availed itself of the privileges of our laws, and it can hardly be said that the state would have anticipated litigating the action here. See, *e.g.*, *Helicopteros Nacionales de Columbia, S.A.* v. *Hall*, No. 82-1127 (Apr. 24, 1984); *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286 (1980). Since the conduct and activities carried on by a foreign state at our embassies often will not meet the minimum due process criteria, the

Moreover, Congress's intent to confine the scope of the FSIA's tort exception to acts or omissions occurring in United States territory is made clear by the examples cited in the legislative history. Section 1605(a)(5) is "directed primarily at the problem of traffic accidents" in this country caused by automobiles owned by foreign embassies. H.R. Rep. 94-1487, *supra*, at 20-21; *id.* at 7. State Department Legal Adviser Monroe Leigh, testifying in support of the FSIA, emphasized that Section 1605(a)(5) "would govern automobile accident cases and other tort actions. It would deny the defense of sovereign immunity with respect to many torts that occur in the United States." *1976 Hearings* 27. See also *id.* at 58 (remarks of Peter D. Trooboff) (FSIA would eliminate immunity for "the negligent operation of a motor vehicle * * * in the District of Columbia"); *id.* at 95 (remarks of Michael M. Cohen) (Section 1605(a)(5) "removes the defense [of immunity] for most tort suits arising here").[9]

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exercise of jurisdiction under the FSIA would frustrate Congress's intent to have the immunity provisions themselves prescribe the necessary minimum contacts.

[9]The same conclusion is suggested in the hearings on the 1973 predecessor bill to the FSIA, which contained a similar exception to immunity for torts occurring in the United States, but no definition of "United States." Bruno Ristau, one of the Act's principal spokesmen, explained to the House that:

> We would like, based on our experiences as a litigant abroad to subsume to the jurisdiction of our domestic courts foreign governments and foreign entities who engage in certain activities *on our territory* to the same extent that the U.S. Government is already at the present time subject to the jurisdiction of foreign courts, when it engages in certain activities on their soil.
>
> * * * * *
>
> [W]e would like to afford to *our local citizens* and entities who deal with foreign governments *in the United States* effective redress through the instrumentality of our courts. If a dispute arises

Thus, Congress's general goal of conforming our laws to the principles espoused by other nations, as well as the more specific goal of addressing the problem of traffic accidents and other routine negligence claims involving foreign officials in this nation, supports the construction of the statute adopted by the court below and the Ninth Circuit in *McKeel*.[10]

c. In deciding what Congress intended when it specified that the tortious injury must occur "in the United States," the practical effects of petitioners' argument must be taken into account.[11] Petitioners' construction of the FSIA creates potentially serious problems for the conduct of our foreign relations. For example, if a vehicle owned by the French Government were involved in an automobile accident on

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as a result of an activity which a government carries on *in this country*, the most appropriate place to resolve such a dispute would be through the courts * * *.

Immunities of Foreign States: Hearings on H. R. 3493 Before the Subcomm. on Claims and Governmental Relations of the House Comm. on the Judiciary, 93d Cong., lst Sess. 29 (1973) (emphasis added). Nothing in the legislative history of the FSIA as finally enacted indicates that Congress intended to expand the scope of the statute's coverage when it included a definition of "United States."

[10]Petitioners apparently contend (Pet. 10-11) that because Congress did not limit the scope of Section 1605(a)(5) solely to traffic accidents, all torts must fall within its purview, irrespective of where the tortious act occurs. But the focus of the legislative history on traffic accidents suggests that Congress only grappled with the problems engendered by garden variety torts committed by foreign nations while in United States territory. There is simply no evidence in the legislative history that Congress intended to abrogate foreign states' immunity for torts occurring anywhere else.

[11]Petitioners criticize the court of appeals for considering the policy implications of their argument (Pet. 14). But the court was careful to note that it "offer[ed] these considerations not as policies we choose but as throwing light on congressional intent" (Pet. App. 10a-11a).

the grounds of the United States Embassy in West Germany, petitioners' construction of the FSIA would make the French Government subject to suit in the United States. There is no basis in international law or practice for such an assertion of jurisdiction over a foreign state by our courts. Such novel assertions of jurisdiction would be clearly inconsistent with foreign nations' understanding of their own sovereignty.[12]

Furthermore, if the United States exercised jurisdiction over foreign states on the basis of minimal contacts with our embassies, such states might hesitate in providing services to our embassies or consulates. Under petitioners' construction of the FSIA, if a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state (see 28 U.S.C. 1603(a)) negligently repaired utilities at an American embassy or negligently provided protective services during disturbances or ambulance services in an emergency, any individual on embassy premises injured by such negligence could sue the host state in the United States.[13]

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[12]Petitioners suggest that jurisdiction may be exercised here due to the extraordinary nature of the international crimes committed by Iran (Pet. 13-14). We agree that Iran's actions clearly constituted a crime under international law, see *Case Concerning United States Diplomatic and Consular Staff in Tehran*, 1980 Int'l Ct. Justice 200, and we also agree that under some circumstances a *nation* may exercise jurisdiction over *individuals* suspected of committing international crimes, even when the crimes do not occur in the territory of the forum. See J. Sweeney, C. Oliver & N. Leech, *Cases and Materials on The International Legal System* 120-121 (2d ed. 1981). But the point here is that Congress has not chosen to authorize private tort actions against *states* guilty of international law violations occurring overseas. The legislative history of the FSIA simply does not manifest any intent to confer such jurisdiction on United States courts.

[13]Petitioners discount these potential problems by noting (Pet. 14) that "injuries on United States military bases overseas are covered by various Status of Forces agreements" and hence are not covered by the FSIA (see 28 U.S.C. 1604). Needless to say, the United States maintains countless enclaves abroad that are not covered by any such agreements.

Similarly, an expansive, non-territorial interpretation of the "United States" would adversely affect the government's relationship with foreign embassies in this country. If, through reciprocity or parity of reasoning (see 6 M. Whiteman, *Digest of International Law* 580-582 (1968)), the United States were to be subjected to foreign court jurisdiction for actions arising in connection with our agents' conduct on foreign embassy premises here, we might hesitate to carry out necessary functions because of that risk. For example, members of the Secret Service Uniformed Division or other law enforcement agencies could not enter foreign embassy premises to assist in quelling a disturbance, even if requested to do so by an Ambassador, without creating the possibility of suit against the United States by a private party in the foreign state's courts. By the same token, disputes arising from the provision of commercial services to foreign embassies by entities of the United States government (perhaps including the District of Columbia, cf. 28 U.S.C. 1603(a)) would, under petitioners' reasoning, be properly heard in the sending state's courts. This result not only is illogical but also would upset the settled expectations that facilitate relations between the United States and foreign embassies located here.

There is no indication that any of these far-reaching consequences were considered by Congress, and it is unlikely that Congress would have imposed them without explicitly making clear its intent to do so. See *Weinberger* v. *Rossi*, 456 U.S. 25, 31-32 (1982).[14]

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[14]As the court below noted (Pet. App. 11a):

> If Congress had meant to remove sovereign immunity for governments acting on their own territory, with all of the potential for international discord and for foreign government retaliation that that involves, it is hardly likely that Congress would have ignored those topics and discussed instead automobile accidents in this country.

2. The claims of Persinger's parents are similarly barred by sovereign immunity. Without question, their causes of action for intentional and negligent infliction of emotional distress are derivative of their son's claims. Immunity bars their claims for the same reasons that it precludes the underlying actions of former hostages. Cf. *Gaspard* v. *United States*, 713 F.2d 1097, 1101-1102 (5th Cir. 1983) (dismissing derivative claims for emotional distress brought by members of servicemen's families under *Feres* doctrine), cert. denied, No. 83-6233 (May 14, 1984); *Lombard* v. *United States*, 690 F.2d 215, 223-226 (D.C. Cir. 1982) (same), cert. denied, No. 82-1443 (June 13, 1983). As the court below reasoned, "[i]t would be anomalous to say that Congress intended to deny a remedy to [a hostage] — a hostage imprisoned and physically abused for more than a year — and yet also intended to expose Iran to a suit by his parents for their emotional distress" (Pet. App. 14a).[15]

The court of appeals further concluded (Pet. App. 15a) that even if the claims were not so clearly derivative, Congress did not intend to permit such suits. As the House Report on the FSIA stated (H.R. Rep. 94-1487, *supra*, at 21 (emphasis added)):

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[15]We note that petitioners' argument not only is anomalous but stretches the infliction of emotional distress theory of tort liability almost beyond recognition. A critical aspect of that theory is geographic proximity; that is, when the tortious conduct is directed at a third person, the immediate family members must have been present to witness that conduct. See, *e.g.*, *Culbert* v. *Sampson's Supermarkets, Inc.*, 444 A.2d 433 (Me. 1982); *Portee* v. *Jaffee*, 84 N.J. 88, 98-100, 417 A.2d 521, 527 (1980); *Dillon* v. *Legg*, 68 Cal. 2d 728, 739-741, 441 P.2d 912, 920, 96 Cal. Rptr. 72, 80 (1968); Restatement (Second) of the Law of Torts § 46(2)(a) (1965). Without such a requirement, almost any event of notoriety could lead to tortious liability in every nation on the basis of satellite news broadcasts. Persinger's parents do not allege that they were in Iran at any time between November 4, 1979, and January 19, 1981, and they did not perceive the indignities visited upon their son by virtue of their unaided senses. Petitioners' theory, therefore, is untenable.

> It [Section 1605(a)(5)] denies immunity as to claims for personal injury or death, or for damage to or loss of property, caused by the tortious act or omission of a foreign state or its officials or employees, acting within the scope of their authority; *the tortious act or omission must occur within the jurisdiction of the United States.*[16]

The court of appeals thus determined that the tortious conduct itself, in addition to the injury, must occur in the United States before immunity is abrogated. Accord, *Asociacion de Reclamantes* v. *United Mexican States*, 735 F.2d 1517, 1525 (D.C. Cir. 1984); *Olsen* v. *Government of Mexico*, Nos. 83-5626 and 83-5629 (9th Cir. July 16, 1984), cert. pending, No. 84-295; *In re Sedco*, 543 F. Supp. 561, 567 (S.D. Tex. 1982). There is no compelling reason for the Court to review that conclusion, particularly in a case arising out of a factual situation concededly "uncommon if not unique" (83-1890 Pet. 17).

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[16]Petitioners correctly note (Pet. 16-18) that the language of the House Report was initially drafted to accompany the 1973 version of the FSIA. That bill (H.R. 3493, 93d Cong., 1st Sess. (1973)) provided that, to be actionable, the injury must have been "caused by the negligence or wrongful act or omission in the United States of that foreign state." Although Section 1605(a)(5) of the FSIA as enacted in 1976 does not specify that the tortious conduct, in addition to the injury, must occur in the United States, nothing in the legislative history suggests that Congress intended to change the substance of the provision. The affidavit of a former State Department lawyer, offered by petitioners for the first time in this Court (Pet. App. 61a-64a), does not suggest otherwise. Mr. Sandler states only that "it is entirely possible" that an "inadvertent mistake" occurred in revising the 1973 section-by-section analysis to conform to the bill ultimately enacted by Congress; he does not state that any mistake in fact occurred.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 84-47

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

GREGORY ALLEN PERSINGER,
LAWRENCE PERSINGER AND JACQUELINE PERSINGER,
Petitioners,

v.

THE ISLAMIC REPUBLIC OF IRAN AND
THE UNITED STATES OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF OF PETITIONERS

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1. The United States, opposing certiorari, now argues, contrary to its position below, that the FSIA permits suits against a foreign state "only for tortious *acts* occurring within the sovereign territorial jurisdiction of the United States." Opp. 6 (emphasis added); *id.* at 9 n.8. In the Court of Appeals, the government argued that, for purposes of suits under Section 1605(a)(5), "it is enough if the tortious *injury* occurs in the United States." See Pet. 6 & n.7 (emphasis added); *id.* at 12 & n.20. The government does not even acknowledge (much less attempt to explain) its about-face or seek to justify its new position in the face of Section 1605(a)(5)'s unambiguous

language. See Pet. 15.[1] Since, as the United States recognizes, the injuries suffered by petitioners Lawrence and Jacqueline Persinger "unquestionably occurred 'in the United States' " (Opp. 4), it was gross error for the Court of Appeals to hold that the District Court lacked jurisdiction to hear their claims against Iran. This error has far-reaching consequences for the application of Section 1605(a)(5) to suits by those who are injured in the United States as a result of a foreign state's tortious conduct abroad.[2]

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[1] The United States recognizes (Opp. 15 n.16) that Section 1605(a)(5), as enacted in 1976, omitted language contained in the provision as originally proposed in 1973 that would have required that both the injury *and* the tortious conduct occur in the United States. See Pet. 16-18. The government argues, however, that this modification of Section 1605(a)(5)'s original language should be accorded no significance. Opp. 15 n.16. But there can be no doubt that the elimination of that language represented a substantive change in the jurisdiction that Section 1605(a)(5) conferred, and—as we have shown—substantive changes made in the statute's original language "were . . . considered very carefully by the Administration" before being proposed to Congress. Sandler Aff. ¶ 4 (Pet. App. 62a). To disregard this change and rely instead on contrary language in the House report that was obviously retained by mistake is to confound the legislative process and the purposes of the FSIA.

[2] The United States does not even attempt to defend the Court of Appeals' holding that, because Iran's tortious conduct did not occur "in the United States," the District Court lacked jurisdiction over Lawrence and Jacqueline Persinger's claims. The government urges only that the court's holding does not merit review (Opp. 15), and it insists that the parents' claims were properly dismissed as "derivative" of the claims of their son. Opp. 14. But neither of the courts below held that Lawrence and Jacqueline Persinger's claims were barred as "derivative"—although the government strenuously argued that their claims should be dismissed for that reason. Had it found merit in the government's position, the Court of Appeals could have upheld the District Court's dismissal of the parents' claims on that more limited ground; but the court instead broadly held that Section 1605(a)(5) permits suits only where a foreign state's tortious conduct, as well as the resulting injury, occurred in the United States.

(*footnote continues*)

2. The United States, urging that U.S. embassy premises should not be deemed to be "territory . . . subject to the jurisdiction of the United States" for purposes of FSIA, also jettisons its previous construction of Section 1603(c) to preserve its victory below. Having persuaded the Court of Appeals that Section 1603(c)'s definition of the United States should be limited to "the continental United States and such islands as are part of the United States or are its possessions" (Pet. App. 8a), the government now claims that the definition should be limited to territory and waters "under American sovereignty." Opp. 7; see *id.* at 6. The government's change of position is apparently due to our demonstration that other statutory definitions of the "United States" render the Court of Appeals' construction of Section 1603(c) untenable. See Pet. 9-10 & n.14. The United States, again, neither acknowledges nor attempts to explain its switch as it proffers ever-shifting constructions of FSIA's terms to support the result reached below.

3. The government's argument that the U.S. embassy in Tehran should not be considered "territory . . . subject to the jurisdiction of the United States" for purposes of FSIA cannot withstand scrutiny. Its reliance on *Cunard S.S. Co.* v. *Mellon,* 262 U.S. 100 (1923), is misplaced. This Court in *Cunard* was not called upon to decide whether territory not subject exclusively to U.S. jurisdiction could be deemed "territory . . . subject to the jurisdiction of the United States." The Court instead was faced with the claim that a merchant ship sailing under an

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(*footnote continued*)

The government's reliance on the *Feres* doctrine to demonstrate that Lawrence and Jacqueline Persinger's claims are barred (Opp. 14) is misplaced. *Feres* bars claims by the families of military personnel arising from injuries to their relatives in the armed forces not because such claims are "derivative" but because litigating those claims would entail the very inquiry into military decision-making that the *Feres* doctrine is meant to preclude.

American flag on the high seas constituted United States "territory" for purposes of the National Prohibition Act. *Id.* at 122-23. Rejecting that claim, the Court held that the term "territory" was used in the Act "in a physical and not a metaphorical sense,—that it refers to areas or districts having fixity of locations and recognized boundaries." *Id.* at 122. Embassy premises plainly satisfy that criterion.

The government also attempts to depict Section 1603(c) as a "legal term of art" that does not mean what it says. Opp. 7. But the statutes to which the government points, defining the United States as "used in the territorial sense" (*id.* at n.4), simply distinguish between references to the United States as a state or a party and the United States as a place. The fact that some statutes which define the United States in terms similar to Section 1603(c) "involve subjects that could not possibly encompass American embassies" (*id.*) does not demonstrate that American embassies do not constitute "territory . . . subject to the jurisdiction of the United States"; such statutes would have no application to embassies because of their subject matter, not because embassies as such are excluded.

The United States claims that construing U.S. embassies to be "territory . . . subject to the jurisdiction of the United States" would permit suits without "the minimum contacts necessary to satisfy due process." Opp. 9 n.8. This claim must be rejected. *First,* the government's suggestion that minimum contacts would be present only if the foreign state's tortious *conduct* occurred in the forum state (*id.*) contradicts its earlier position that it is enough for FSIA's purposes if the *injury* occurred in the United States. *Second,* if a foreign state enters upon territory subject to the jurisdiction of the United States—including U.S. embassy premises—it is entirely reasonable to assume that the foreign state anticipates being held accountable in American courts for injuries it causes on such

territory. *Third,* both international law and United States law have long recognized that a nation may exercise jurisdiction over international crimes even when such crimes do not occur in the territory of the forum state. See Pet. 13. No foreign state entering embassy premises for such criminal purposes could reasonably fail to anticipate that it would be called to justice in U.S. courts.

The government's law-exam hypotheticals present no difficulty. In the examples involving torts by a foreign state on U.S. embassy premises (see Opp. 12), the foreign state would be free to invoke the doctrine of *forum non conveniens* if sued in American courts; under principles of "reciprocity or parity of reasoning" (*id.* at 13), the same doctrine would be available to the United States if it were sued abroad for tortious injuries occurring on the premises of a foreign state's embassies. See *id.* For the same reason, construing Section 1603(c) to include *all* "territory . . . subject to the jurisdiction of the United States" presents no problem with respect to the unidentified "countless enclaves" that the government says the United States maintains abroad (Opp. 12 n.13); and in any event this Court need not hold that such "enclaves" constitute "territory . . . subject to the jurisdiction of the United States" under Section 1603(c) to hold that U.S. embassies satisfy that definition.

If permitting suits here for particular types of tortious injury occurring on U.S. embassy premises were thought to threaten particular difficulty for the United States, Congress could readily qualify Section 1605(a) to preclude suits in American courts for such injuries. But the government has shown no justification for judicially qualifying the reach of Section 1605(a) by importing into Section 1603(c)'s definition of "United States" a wholesale bar to suits for tortious injuries occurring on U.S. embassy premises.

4. This case tests the willingness of the federal courts to entertain compelling claims that are plainly allowed by the express terms of FSIA. The United States managed to persuade the Court of Appeals, on rehearing, to disregard the plain terms of the statute, and, having managed to secure that victory below, the United States now urges this Court to deny review—even as the lurches in the government's own position with respect to the meaning of the statutory provisions at issue make the case for review more compelling. The questions raised by the judgment below are fully developed, starkly drawn, and of manifest national importance. They clearly warrant review.

CONCLUSION

For the foregoing reasons, as well as for the reasons set forth in the petition, review should be granted.

Respectfully submitted,

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